# COMMENTARIES

ON THE

L A W S

OF

### ENGLAND.

BOOK THE FOURTH.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S

COURT OF COMMON PLEAS.

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## COMMENTARTES

ON THE

### LAWS OF ENGLAND.

BOOK THE FOURTH.

#### OF PUBLIC WRONGS.

CHAPTER THE FIRST.

# OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

E are now arrived at the fourth and last branch of these commentaries; which treats of public wrongs, or crimes and misdemesnors. For we may remember that, in the beginning of the preceding volume a, wrongs were divided into two species; the one private, and the other public. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemesnors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes;

thirdly, their feveral degrees of guilt, as principles or acceffories; fourthly, the feveral species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and fixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemessor.

FIRST, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence b.

THE knowlege of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it it's adequate and necessary penalty, is of the utmost importance to every individual in the state. For, (as every great mafter of the crown law has observed upon a fimilar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at fome time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable pasfions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable confequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly

b See Vol. I. p. 268.

forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it fometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their flead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors of factions have established, in the various revolutions of government; from giving a lasting efficacy to fanctions that were intended to be temporary, and made (as lord Bacon expresses it) merely upon the spur of the occasion; or from, laftly, too haftily employing fuch means as are greatly difproportionate to their end, in order to check the progress of fome very prevalent offence; from fome, or from all, of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own d. But even with us in England, where our crown-law is with juffice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accufations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by fuch of his equals, against whom he can form no exception nor even a personal dislike; -even here we shall occasionally find room to remark some particulars, that feem to want revision and amendment, These have chiefly arisen from too scrupulous an adherence to some rules of the antient common law, when the reasons have ceased upon which those rules were founded; from not

d Baron Montesquieu, marquis Beccaria, &c.

repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely confidered by perfons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon . And furely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives, of thousands. Had such a refetence taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard f. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be feen for one month in the company of persons who call themselves, or are called Egyptians 5 (a).

IT is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public:

f Stat. 9 Geo. I. c. 22. 31 Geo. II. e. 42.

" faid act shall be, and the same is hereby repealed."]

e See Vol. II. p. 345. 

§ Stat. 5 Eliz. c. 20.

<sup>(</sup>a) [But now by statute 23 Geo. 3. c. 51. it is enacted as follows: "Whereas an act made in the fifth year of the reign of queen Elizabeth, intituled, An act for further punishment of vagabonds calling themselves Egyptians, is and ought to be

confidered as a law of excessive severity, be it therefore enacted, ed, &c. that from and after the first day of August 1783, the

but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the talk of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of fuch a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premifed this apology for some of the ensuing remarks, which might otherwife feem to favour of arrogance, I proceed now to confider (in the first place) the general nature of crimes.

I. A CRIME, or misdemession, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and mifdemesnors; which, properly speaking, are mere fynonymous terms: though, in common usage, the word " crimes" is made to denote fuch offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler names of " misdemesnors" only.

THE distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to confist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, confidered merely as individuals; public wrongs, or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, confidered as a community, in it's focial aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; fince, befides the injury done to individuals, they strike at the very being of fociety, which cannot possibly subfift, where actions of this fort are fuffered to escape with impunity. IN

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason in it's consequences principally tends to the diffolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of fociety confiders principally the lofs which the state fustains by being deprived of a member, and the pernicious example thereby fet for others to do the like. Robbery may be considered in the same view; it is an injury to private property; but were that all, a civil fatisfaction in damages might atone for it: the public mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is fwallowed up in the public: we feldom hear any mention made of fatisfaction to the individual; the fatisfaction to the community being fo very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not fo fevere, but it affords room for a private compensation also: and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the fuit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil fatisfaction in damages. So also, in case of a public nusance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's subjects:

but if any individual fustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: viz. not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these commentaries: but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

- II. THE nature of crimes and misdemesnors in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of punishments: which are evils or inconveniencies consequent upon crimes and misdemesnors; being devised, denounced, and inslicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the power, the end, and the measure of human punishment.
- 1. As to the power of human punishment, or the right of the temporal legislator to inslict discretionary penalties for crimes and misdemessnors. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any one, it must also be vested in all mankind;

A 4 Puffendorf, L. of Nat. & N. b. 8.c.3.

fince all are by nature equal. Whereof the first murderer Cain was fo fenfible, that we find him i expressing his apprehensions, that whoever should find him would flay him. In a state of society this right is transferred from individuals to the fovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the fword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any) of punishing not only their own subjects, but also foreign embassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt k.

As to offences merely against the laws of society, which are only mala prohibita, and not mala in se; the temporal magistrate is also empowered to inslict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security.

This right therefore, being thus conferred by universal confent, gives to the state exactly the same power, and no more, over all it's members, as each individual member had

<sup>3</sup> Gen. iv. 14.

naturally over himself or others. Which has occasioned fome to doubt, how far a human legislature ought to inflict capital punishments for positive offences; offences against the municipal law only, and not against the law of nature; fince no individual has, naturally, a power of inflicting death upon himfelf or others for actions in themselves indifferent, With regard to offences mala in fe, capital punishments are in some instances inslicted by the immediate command of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative 1, " whoso sheddeth man's blood, by man shall " his blood be shed." In other instances they are inslicted after the example of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inslicted without fuch express warrant or example, at the will and discretion of the human legislature; as for forgery, for theft, and fometimes for offences of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offences against natural, but only against focial, rights; not even theft itself, unless it be accompanied with violence to one's house or person: all others being an infringement of that right of property, which, as we have formerly feen m, owes it's origin not to the law of nature, but merely to civil fociety.

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale ": " when offences grow "enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or it's inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it.

<sup>1</sup> Gen. ix. 6.

B 1 Hal. P. C. 13.

P Book II. ch. 1.

It is not it's frequency only, or the difficulty of otherwife preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; fince there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for flight offences, or fuch as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her more fanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are asfured, that neither of these illustrious princesses have, throughout their whole administration, inslicted the penalty of death: and the latter has, upon full perfuation of it's being ufeless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions o. But indeed, were capital punishments proved by experience to be a fure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is univerfally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a fovereign that thinks feriously can never

o Grand instructions for framing a new code of laws for the Russian empire, §. 210.

justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation, and the sullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I would not be understood to deny the right of the legiflature in any country to enforce it's own laws by the death of the transgressor, though persons of some abilities have doubted it; but only to suggest a sew hints for the consideration of such as are, or may hereaster become, legislators. When a question arises, whether death may be lawfully inslicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

2. As to the end, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, sines, and temporary exile or imprisonment are inslicted: or, by deterring others by the dread of his example from offending in the like way, "ut poena (as Tully expresses it) ad paucos, metus ad omnes perveniat;" which gives rise to all ignominious punishments, and to such executions of justice as are open and

public: or lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, flavery, or exile. The fame one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal fecurity, whether the offender himfelf be amended by wholefome correction, or whether he be difabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, flavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of fome one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in fuch cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

3. As to the measure of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

Hence it will be evident, that what fome have so highly extolled for it's equity, the lex talionis, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent: to which we may add that

that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without fufficient caufe was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumftances, may enhance or mitigate the offence; and in fuch cases retaliation can never be a proper measure of justice. If a nobleman strikes a peafant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may, fometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too flight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered; by decreeing, in imitation of Solon's laws 9, that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the fame hurt he has done to his neighbour and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepid affaffin is a poor fatisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict,

and tends most to the security of mankind; by removing one murderer from the earth, and fetting a dreadful example to deter others: fo that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage suftained by the fufferer, the punishment ought rather to exceed than equal the injury: fince it feems contrary to reafon and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the fuffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which confift merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the confpirator has also a chance to escape his punishment: and this may be one reason why the lex talionis is more proper to be inflicted, if at all, for crimes that confift in intention, than for fuch as are carried into act. It feems indeed confonant to natural reason, and has therefore been adopted as a maxim by feveral theoretical writers, that the punishment due to the crime of which one falfely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for fuch only as preferred malicious accufations against others; it being enacted by statute 37 Edw. III. ch. 18. that such as preferred any fuggestions to the king's great council should put in fureties of taliation; that is, to incur the fame pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its flead s.

Bur though from what has been faid it appears, that there cannot be any regular or determinate method of rating the

\* Beccar. c. 15.

8 Stat. 38 Edw. III. c. 9.

quantity

quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some affistance in allotting it an adequate punishment.

As, first, with regard to the object of it : for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the king's death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a defign to transgress is not fo flagrant an enormity, as the actual completion of that defign. For evil, the nearer we approach it, is the more difagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it; and it is an encouragement to repentance and remorfe, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deferve the highest degree of feverity; not because the intention is equivalent to the act itself; but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

AGAIN: the violence of passion, or temptation, may sometimes alleviate a crime; as thest, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise)

of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime.

FARTHER: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness v: and, among crimes of an equal malignity. those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes ", " ea sunt animadvertenda peccata maxime, quae dif-" ficillime praecaventur." Hence it is, that for a fervant to rob his mafter is in more cases capital, than for a stranger: if a fervant kills his mafter, it is a species of treason; in another it is only murder: to fteal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried fo far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to fleal a pig or a fowl, which is eafily done, was a capital misdemesnor, and the offender was punished with death w.

Lastly, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inslicted, have less essect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due

t Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received.

<sup>&</sup>quot; I was abused, says he, by my enemy, in cold blood, out of malice, not by

heat of wine, in the morning, pub-

<sup>&</sup>quot; licly, before ftrangers as well as citi-

<sup>&</sup>quot; zens; and that in the temple, whither the duty of my office called me."

v Beccar. c. 6.

u pro Sexto Refeio. 40.

W 4 Inft. 285.

distinctions of severity. It is the sentiment of an ingenious writer, who feems to have well studied the springs of human action x, that crimes are more effectually prevented by the certainty, than by the feverity, of punishment. For the excessive severity of laws (says Montesquieu y) hinders their execution: when the punishment furpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute I Mar. st. I. c. I. recites in it's preamble, "that the ftate of every king confifts more affuredly " in the love of the subject towards their prince, than in the of dread of laws made with rigorous pains; and that laws " made for the preservation of the commonwealth without er great penalties are more often obeyed and kept, than laws " made with extreme punishments." Happy had it been for the nation, if the fubsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe that fanguinary laws are a bad fymptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the decemviri, were full of cruel punishments: the Porcian law, which exempted all citizens from fentence of death, filently abrogated them all. In this period the republic flourished: under the emperors fevere punishments were revived; and then the empire fell.

It is moreover abfurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the ultimum supplicium, to every case of dissiculty. It is, it must be owned, much easier to extirpate than to amend mankind: yet

x Beccar. c. 7.

y Sp. L. b. 6. c. 13.

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that

that magistrate must be esteemed both a weak and a cruel furgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed z, that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wife legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men fee no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the fame a: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or diffection, robbers have a hope of transportation, which feldom is extended to murderers. This has the same effect here as in China; in preventing frequent affaffination and flaughter.

YET, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inslicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament b to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders.

<sup>2</sup> Becear. c. 6.

<sup>2</sup> Sp. L. b. 6. c. 16.

b See Ruffhead's index to the statutes (tit. felony) and the acts which have since been made.

The injured, through compassion, will often forbear to profecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a facrifice to those laws, which long impunity has taught him to contemn.

#### CHAPTER THE SECOND.

# OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, considered in general the nature of crimes, and punishments, we are next led, in the order of our distribution, to inquire what persons are, or are not, capable of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

ALL the feveral pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in question, being the only thing

may

that renders human actions either praifeworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in foro conscientiae, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can fearch the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is neceffary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vitious will without a vitious act is no civil crime, fo, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to conflitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act confequent upon fuch vitious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no difcernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will fufficient, residing in the party; but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will fits neuter; and neither concurs with the act, nor difagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is fo far from concurring with, that it loaths and difagrees to, what the man is obliged to perform. It will be the bufiness of the present chapter briefly to confider all the feveral species of defect in will, as they fall under fome one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which B 3

may be referred to the fecond; and compulsion or necessity, which may properly rank in the third.

I. FIRST, we will consider the case of infancy, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal profecution whatever 2. What the age of discretion is, in various nations, is matter of some variety. The civil law diffinguished the age of minors, or those under twenty-five years old, into three stages: infantia, from the birth till seven years of age; pueritia, from feven to fourteen; and pubertas, from fourteen upwards. The period of pueritia, or childhood, was again subdivided into two equal parts: from feven to ten and an half was aetas infantiae proxima; from ten and an half to fourteen was aetas pubertati proxima. During the first stage of infancy, and the next half stage of childhood, infantiae proxima, they were not punishable for any crime b. During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be doli capaces, or capable of mischief: but with many mitigations, and not with the utmost rigour of the law. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.

THE law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemesnors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences d: for, not having the command of his fortune till twenty-one, he wants the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit) for these an infant, above

<sup>2 1</sup> Hawk. P. C. 2.

b Inft. 3. 20. 10.

c Ff. 29. 5. 14. 50. 17. 111. 47. 2. 23. d 1 Hal. P. C. 20, 21, 22.

the age of fourteen, is equally liable to fuffer, as a person of the full age of twenty-one.

WITH regard to capital crimes, the law is still more minute and circumfpect; diftinguishing with greater nicety the feveral degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open d: and from thence till the offender was fourteen, it was aetas pubertati proxima, in which he might, or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever fince the time of Edward the third, the capacity of doing ill, or contracting guilt, is not fo much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that " malitia supplet aetatem." Under seven years of age indeed an infant cannot be guilty of felony e; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony f. Also, under fourteen, though an infant shall be prima facie adjudged to be doli incapax; yet if it appear to the court and jury, that he was doli capax, and could difcern between good and evil, he may be convicted and fuffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been fentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himfelf, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion

e Mir. c. 4. §. 16. 1 Hal. P. C. 27.

d LL. Athelstan. Wilk. 65. f Dalt. Just. c. 147.

to discern between good and evil . And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly h. Thus alfo. in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a mischievous difcretion; and, as the sparing this boy merely on account of his tender years might be of dangerous confequence to the public, by propagating a notion that children might commit fuch atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment 1. But, in all fuch cases, the evidence of that malice, which is to fupply age, ought to be strong and clear beyond all doubt and contradiction.

II. THE fecond case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "furiofus furore folum punitur." criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself k. Also, if a man in his found memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his fenses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonfane memory, execution shall be stayed: for peradventure, fays the humanity of the English law, had the prifoner been of found memory, he might have alleged fome-

<sup>1</sup> Hal P. C. 26, 27.

h Emlyn on I Hal. P. C. 25.

i Foster. 72.

k 3 Inft. 6.

thing in stay of judgment or execution 1. Indeed, in the bloody reign of Henry the eighth, a statute was made ". which enacted, that if a person, being compos mentis, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this favage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by fir Edward Coke", " the execution of an of-" fender is for example, ut poena ad paucos, metus ad omnes " perveniat: but so it is not when a madman is executed; " but should be a miserable spectacle, both against law, and " of extreme inhumanity and cruelty, and can be no example " to others." But if there be any doubt, whether the party be compos or not, this shall be tried by a jury. And if he be fo found, a total idiocy, or absolute infanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under fuch deprivation of the fenses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency o. Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be fuffered to go loofe, to the terror of the king's fubjects. It was the doctrine of our antient law, that persons deprived of their reason might be confined till they recovered their fenfes p, without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts q, a method is chalked out for imprisoning, chaining, and fending them to their proper homes.

III. THIRDLY; as to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather

<sup>1 1</sup> Hal. P. C. 34.

m 33 Hen. VIII. c. 20.

p 3 lnft. 6.

o 1 Hal. P. C. 31.

P Bro. Abr. tit. corone. 101.

<sup>2 17</sup> Geo. II. c. 5.

than as an excuse for any criminal misbehaviour. A drunkard, fays fir Edward Coke, who is voluntarius daemon, hath no privilege thereby; but what hurt or ill foever he doth. his drunkenness doth aggravate it: nam omne crimen ebrietas. et incendit, et detegit. It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The fame indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, fays the prefident Montesquieu's, drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more feverely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that " he who committed a crime, when drunk, should receive " a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law indeed made great allowances for this vice: " per vinum delapsis capitalis poena remittitur"." But the law of England, confidering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real) will not fuffer any man thus to privilege one crime by another w.

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by misfortune or chance, and not by defign. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief hap-

r 1 Inft. 247.

<sup>8</sup> Sp. L. b. 14. c. 10.

<sup>1</sup> Puff. L. of N. b. S. c. 3.

u Ff. 49. 16. 6.

w Plowd. 19.

pens to follow from the performance of a lawful act, the party stands excused from all guilt: but if a man be doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour x.

V. FIFTHLY, ignorance, or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting feparately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action y: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does fo; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and prefumed to know, is in criminal cases no fort of defence. Ignorantia juris, quod quifque tenetur scire, neminem excusat, is as well the maxim of our own law z, as it was of the Roman a.

VI. A SIXTH species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if lest to itself) would reject. As punishments are therefore only inslicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

x 1 Hal. P. C. 39.

z Plowd. 343.

y Cro, Car. 538.

a Ff. 22.6. 9.

1. Of this nature, in the first place, is the obligation of eivil subjection, whereby the inferior is constrained by the fuperior to act contrary to what his own reason and inclination would fuggest: as when a legislator establishes iniquity by a law, and commands the fubject to do an act contrary to religion or found morality. How far this excuse will be admitted in foro conscientiae, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a fufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigotted days of queen Mary, was not liable to punishment from Elizabeth, for executing fo horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of it's merciless fifter, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a fon or a fervant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or mafter b; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will c. Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king

b 1 Hawk. P. C. 3.

Ina the West Saxon d. And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any fervant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave difmissed; " proculdubio quod alterum libertas, alterum necessitas " impelleret "." But (befides that in our law, which is a ftranger to flavery, no impunity is given to fervants, who are as much free agents as their masters) even with regard to wives. this rule admits of an exception in crimes that are mala in fe. and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye; but also, fince in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil fociety. In treason also, (the highest crime which a member of fociety can, as fuch, be guilty of) no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt f: as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most facred tie of focial community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemefnors also, we may remark another exception; that a wife may be indicted and fet in the pillory with her hufband, for keeping a brothel; for this is an offence touching the domestic oeconomy or government of the house, in which the wife has a principal share; and is also such an offence as the law prefumes to be generally conducted by the intrigues of the female fex g. And in all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme-fole.

a cap. 57.

f 1 Hal. P. C. 47.

e Stiernh. de jure Sucon. l. 2. c. 4. & I Hawk. P. C. 2. 3.

- 2. Another species of compulsion or necessity is what our law calls durefs per minash; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemesnors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded; such, "qui cadere " possit in virum constantem, non timidum et meticulosum," as Bracton expresses it i, in the words of the civil law k. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace!. This however feems only, or at least principally, to hold as to politive crimes, fo created by the laws of fociety; and which therefore fociety may excuse; but not as to natural offences, fo declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently affaulted, and hath no other possible means of escaping death, but by killing an innocent person: this fear and force shall not acquit him of murder; for he ought rather to die himfelf, than escape by the murder of an innocent<sup>m</sup>. But in fuch a case he is permitted to kill the affailant; for there the law of nature, and felf-defence it's primary canon, have made him his own protector.
- 3. THERE is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and ressection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of chusing one, he chuses the

h See Vol. I. pag. 131. i l. 2. f. 16.

<sup>1 1</sup> Hal. P. C. 50. m Ibid. 51.

<sup>¥</sup> Ff. 4. 2. 5 € 6.

least pernicious of the two. Here the will cannot be faid freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in chusing the less. Of this fort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malesactors, are of the utmost consequence to the public: and therefore excuse the felony, which the killing would otherwise amount to n.

4. THERE is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or cloathing may justify stealing either, to relieve his present necessities. And this both Grotius and Puffendorf p, together with many other of the foreign jurifts, hold in the affirmative; maintaining by many ingenious, humane, and plaufible reasons, that in such cases the community of goods by a kind of tacit concession of society is revived. And fome even of our own lawyers have held the fame q, though it feems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no fuch excuse at present. And this it's doctrine is agreeable not only to the fentiments of many of the wifest antients, particularly Cicero's, who holds that " fuum cuique incommodum ferendum est, potius quam " de alterius commodis detrahendum;" but; also to the Jewish law, as certified by king Solomon himfelft: " if a thief " fteal to fatisfy his foul when he is hungry, he shall restore

n 1 Hal. P. C. 53.

r 1 Hal. P. C. 54.

o de jure b. & p. 1. 2. c. 2.

s de off. 1. g. c. 5.

P L. of Nat. and N. l. 2. c. 6.

t Prov. vi. 30.

<sup>4</sup> Britton. c. 10. Mirr. c. 4. §. 16.

<sup>«</sup> feven-

" fevenfold, and shall give all the substance of his house:" which was the ordinary punishment for theft in that king-And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting fo dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parfimonious industry of the natives orders every one to work or flarve, yet must lose all their weight and efficacy in England, where charity is reduced to a fyftem, and interwoven in our very conftitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider; that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in it's stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate it's rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compaffion, than to countenance and establish theft by one general undiftinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a desiciency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the perfon;

fon; which extend as well to the will as to the other qualities of his mind. I mean the case of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law "; which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume ", to which I must refer the reader.

4 1 Hal. P. C. 44.

w Book I. ch. 7. pag. 244.

## CHAPTER THE THIRD.

## OF PRINCIPALS AND ACCESSORIES.

IT having been shewn in the preceding chapter what perfons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; viz. as principal, and as accessory.

I. A MAN may be principal in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree. he is who is prefent, aiding, and abetting the fact to be done a. Which presence need not always be an actual immediate standing by, within fight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at fome convenient diffance b. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or perfuading another to drink it c who is ignorant of it's poisonous quality d, or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold, with regard to other murders committed in the absence

<sup>2 1</sup> Hal. P. C. 615.

d Foster. 349.

b Foster. 350.

e 3 Inft. 138.

c Kel. 52.

1

d

of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beaft, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon enfues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an acceffory, that necessarily prefuppofing a principal; and the poison, the pitfall, the beaft, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty. either as principal or acceffory, and cannot be fo as acceffory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or affift f.

II. An acceffory is he who is not the chief actor in the offence, nor present at it's performance, but is someway concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will, first, examine, what offences admit of accessories, and what not: fecondly, who may be an accessory before the fact: thirdly, who may be an accessory after it: and, lastly, how accesfories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in selony, making him a principal in high treason, upon account of the heinousness of the crime. Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the

f 1 Hal. P. C. 617. 2 Hawk, P. C. 315. E 3 Inft. 138, 1 Hal. P. C. 613.

C 2 very

very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor h. In petit treason, murder, and felonies with or without benefit of clergy, there may be acceffories: except only in those offences, which by judgment of law are fudden and unpremeditated, as manflaughter and the like; which therefore cannot have any accessories before the fact i. So too in petit larceny, and in all crimes under the degree of felony, there are no accessories cither before or after the fact; but all persons concerned therein, if guilty at all, are principalsk: the fame rule holding with regard to the highest and lowest offences; though upon dif-In treason all are principals, propter odium ferent reasons. delicti; in trespass all are principals, because the law, quae de minimis non curat, does not descend to distinguish the different shades of guilt in petty misdemesnors. It is a maxim, that accessorius sequitur naturam sui principalis1: and therefore an acceffory cannot be guilty of a higher crime than his principal; being only punished, as a partaker of his guilt. So that if a fervant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been prefent and affifting, he would have been guilty as principal of petty treason, and the stranger of murder m.

2. As to the fecond point, who may be an accessory before the fact; sir Matthew Hale n defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then advises B to kill another, and

h Foster. 342.

i 1 Hal. P. C. 615.

k Ibid. 613.

<sup>1 3</sup> Inft. 139.

m 2 Hawk. P. C. 315.

a 1 Hal. P. C. 615, 616.

B does it in the absence of A, now B is principal, and A is acceffory in the murder. And this holds, even though the party killed be not in rerum natura at the time of the advice given. As if A, the reputed father, advises B the mother of a bastard child, unborn, to strangle it when born, and she does fo; A is accessory to this murder o. And it is also settled P, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an acceffory before the fact. It is likewise a rule, that he who in any wife commands or counfels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him fo that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not acceffory to the robbery, for that is a thing of a distinct and unconfequential nature q. But if the felony committed be the fame in fubstance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poifon Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumstance '.

3. An accessory after the fact may be, where a person, knowing a selony to have been committed, receives, relieves, comforts, or assists the selon. Therefore, to make an accessory ex post facto, it is in the first place requisite that he knows of the selony committed. In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a selon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As surnishing him with a horse to escape his

o Dyer. 186.

P Foster. 125.

<sup>9 1</sup> Hal. P. C. 617.

<sup>2</sup> Hawk. P. C. 316.

<sup>8 1</sup> Hal. P. C. 618.

t 2 Hawk. P. C. 319.

purfuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him t. So likewise to convey instruments to a fe-Ion to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. to relieve a felon in gaol with cloaths or other necessaries, is no offence: for the crime imputable to this species of accesfory is the hindrance of public justice, by affisting the felon to escape the vengeance of the law v. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law, a mere misdemesnor, and made not the receiver accessory to the theft, because he received the goods only, and not the felon ": but now by the statutes 5 Ann. c. 31. and 4 Geo. I. c. 11. all fuch receivers are made acceffories (where the principal felony admits of acceffories."), and may be transported for fourteen years; and, in the case of receiving linen goods stolen from the bleaching-grounds, are by statute 18 Geo. II. c. 27. declared felons without benefit of clergy. In France fuch receivers are punished with death: and the Gothic constitutions distinguished also three forts of thieves, " unum qui " confilium daret, alterum qui contrectaret, tertium qui recep-" taret et occuleret ; pari poenae singulos obnoxios x."

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed y. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a

t 2 Hawk P. C. 317, 318.

v 1 Hal. P.C. 620, 621.

u 1 Hal. P. C. 620.

w Foster. 73.

x Stiernhook de jure Gotb. 1. 3. c. 5.

y 2 Hawk. P. C. 320.

felony,

felony, the receivers become accessories ex post facto 2. a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is prefumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord a.

4. THE last point of enquiry is, how accessories are to be treated, confidered diffinct from principals. And the general rule of the antient law (borrowed from the Gothic constitutions b) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable c: as, by the laws of Athens, delinquents and their abettors were to receive the fame punishment d. Why then, it may be asked, are such elaborate distinctions made between acceffories and principals, if both are to fuffer the fame punishment? For these reasons. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accufation from that of harbouring the robber. 2. Because, though by the antient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a diffinction is made between them: accessories after the fact being still allowed the benefit of clergy in all cases, except horse-stealing and stealing of linen from bleaching-grounds ; which is denied to the principals, and acceffories before the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning 8. And perhaps if a diffinction were constantly to be made between the punishment of principals and accesfories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would

<sup>2 3</sup> Inft. 108. 2 Hawk. P. C. 320. d Pott. Antiq. b. 1. c. 26.

a 1 Hal. P. C. 621.

b See Stiernhook. ibid.

c 3 lnft. 188.

a Stat. 31 Eliz. c, 12.

f Stat. 18 Geo. II. c. 27.

g 1 Hal. P. C. 615.

be greater than that of his accomplices, by reason of the difference of his punishment b. 3. Because formerly no man could be tried as accessory, till after the principal was convicted, or at least he must have been tried at the same time with him: though that law is now much altered, as will be shewn more fully in it's proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also i. But it is clearly held, that one acquitted as principal may be indicted as an accessory after the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in it's commencement to the other. Upon these reasons the distinction of principal and acceffory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and fuch accessories as offend before the fact is committed.

Boccar. c, 37.

i 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foster. 361.

CHAPTER THE FOURTH.

## OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the feveral species of crimes and misdemessnors, with the punishment annexed to each by the laws of England. It was observed in the beginning of this book a, that crimes and misdemesnors are a breach and violation of the public rights and duties, owing to the whole community, confidered as a community, in it's focial aggregate capacity. And in the very entrance of these commentaries b it was shewn, that human laws can have no concerns with any but focial and relative duties; being intended only to regulate the conduct of man, confidered under various relations, as a member of civil fociety. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society; and, of confequence, private vices, or breach of mere absolute duties, which man is bound to perform confidered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowlege and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any

a See pag. 5.

e Beccar. ch. 8.

<sup>\*</sup> See Vol. I. pag. 133, 124,

shape is derogatory from found morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompence is given. And yet drunkenness and malevolent lying are in foro conscientiae as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemesnors, which are punished by the municipal law, that have in themselves nothing criminal, but are made unlawful by the politive constitutions of the state for public convenience. Such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality confifts in their disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make fome things unlawful, which are in themfelves indifferent. Upon the whole therefore, though part of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatife of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premifed this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly instringe

infringe the rights of the public or commonwealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

FIRST then, of fuch crimes and misdemesnors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals are to censure.

I. Of this species the first is that of apostacy, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place in fuch as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods d; to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the fame iniquity e. punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton f, that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from it's own intrinsic truth, of the utmost consequence to the civil state: which a fingle instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our faviour Christ) these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence

d Cod. 1. 7. 1.

c Ibid. 6.

therefore, all confidence in human veracity, must be weaked by apostacy, and overthrown by total infidelity s. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, in those who have once professed it, are highly deferving of cenfure. But yet the lofs of life is a heavier penalty than the offence, taken in a civil light, deferves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclefiaftical courts, which corrected the offender pro falute animae. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those mifcreants h to the privileges of fociety, who maintained fuch principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advifed speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchasor of lands, and shall suffer three years imprisonment without To give room however for repentance, if, within bail. four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offence is that of herefy, which confifts not in a total denial of christianity, but of some of it's effential

& Utiles effe opiniones has, quis negat, fit societas civium inter ipsos, Diis immortalibus interpesitis tum judicibus tum testibus ? Cic. de LL. ii. 7.

eum intelligat, quam multa firmentur jurejurando; quantae salutis sint foederum religiones ; quam multos divini supplicit metus a scelere revecarie; quamque sancta

h Mesersyantz in our antient law books is the name of unbelievers. doctrines,

doctrines, publicly and obstinately avowed; being defined by fir Matthew Hale, " fententia rerum divinarum humano fenfu ex-" cogitata, palam docta et pertinaciter defensai. And here it must also be acknowleded that particular modes of belief or unbelief, not tending to overturn christianity itself, or to fap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged herefy, was left by our old conflitution to the determination of the ecclefiaftical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewodek, extends to the fmallest deviations from the doctrines of holy church " bae-" reticus est qui dubitat de fide catholica, et qui negligit servare " ea, quae Romana ecclefia statuit, seu servare decreverat." Or, as the statute 2 Hen. IV. c. 15. expresses it in English, " teachers of erroneous opinions, contrary to the faith and " bleffed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, feems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the fanctimonious hypocrify of the canonifts went at first no farther than enjoining penance, excommunication, and ecclefiaftical deprivation, for herefy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods in pios usus. But in the mean time they had prevailed upon the weakness of bigoted princes, to make the civil power fubservient to their purposes, by making herefy not only a temporal, but even a capital offence: the Romish ecclefiastics determining, without appeal, whatever they pleased to be herefy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, ut citra mortis periculum sententia circa eum moderatur! : well knowing at the same time that they were delivering the un-

i 1 Hal. P. C. 384.

<sup>1</sup> Decretale 1. 5. 1. 40. c. 27.

k cap. de baereticis.

happy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian ": hence also the constitution of the emperor Frederic mentioned by Lyndewode ". adjudging all persons without distinction to be burnt with fire. who were convicted of herefy by the ecclefiaftical judge. The fame emperor, in another constitution o, ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to feife and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, fo long claimed and fo fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful fons of the church. The immediate event of this constitution was something fingular, and may ferve to illustrate at once the gratitude of the holy fee, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou P.

Christianity being thus deformed by the daemon of perfecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents a writ de haeretico comburendo, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ de haeretico comburendo being not a writ of course, but issuing only by the special direction of the king in council.

m Cod. l. 1. tit. 5.

n c. de baereticis.

o Cod. 1. 5. 4.

P Baldus in Cod. 1. 5. 4.

<sup>9</sup> F. N. B. 269.

r 1 Hal. P. C. 395.

Bur in the reign of Henry the fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy s) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament, which tharpened the edge of perfecution to it's utmost keenness. For, by that statute, the diocesan alone, without the intervention of a fynod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound ex officio, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the confent of the crown. By the statute 2 Hen. V. c. 7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's confistory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the ecclefiaftics was fomewhat moderated: for though what herefy is, was not then precifely defined, yet we are told in some points what it is not: the flatute 25 Hen. VIII. c. 14. declaring, that offences against the fee of Rome are not herefy; and the ordinary being thereby reftrained from proceeding in any case upon mere fuspicion; that is, unless the party be accused by two credible witnesses, or an indictment of herefy be first previously found in the king's courts of common law. And yet the spirit of perfecution was not then abated, but only diverted into a lay channel. For in fix years afterwards, by ftatute 31 Hen. VIII. c. 14. the bloody law of the fix articles was made, which eftablished the fix most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the facrifice of the mass, and auricular confession; which points were "determined and resolved by "the most godly study, pain, and travail of his majesty: for

<sup>(</sup>an etymology, which was afterwards A. D. 1315. Mod. Un. Hift. xxvi. 13. devised in order to justify the burning of Spelm. Gloff. 371. them; Matt. xiii. 30.) but from one

s So called not from lolium, or tares, Walter Lolhard, a German reformer,

t 2 Hen. IV. c. 15.

"which his most humble and obedient subjects, the lords "spiritual and temporal and the commons, in parliament affembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

I SHALL not perplex this detail with the various repeals and revivals of these fanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, unfullied with party rancour, or perfonal caprice and refentment. By statute r Eliz. c. 1. all former statutes relating to herefy are repealed, which leaves the jurifdiction of herefy as it flood at common law; viz. as to the infliction of common censures, in the ecclefiastical courts; and in case of burning the heretic, in the provincial fynod only v. Sir Matthew Hale is indeed of a different opinion, and holds that fuch power refided in the diocefan alfo, though he agrees, that in either case the writ de baeretico comburendo was not demandable of common right, but grantable or otherwise merely at the king's difcretion ". But the principal point now gained was, that by this statute a boundary is for the first time fet to what shall be accounted herefy; nothing for the future being to be fo determined, but only fuch tenets, which have been heretofore fo declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the affent of the clergy in convocation. Thus was herely reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable

to be burnt, for what perhaps he did not understand to be herefy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ de baeretico comburendo remained still in force; and we have instances of it's being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and herefy again subjected only to ecclesiastical correction pro falute animae, by virtue of the statute 29 Car. II. c. 9. For, in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the babeas corpus act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

In what I have now faid I would not be understood to derogate from the just rights of the national church, or to favour a loofe latitude of propagating any crude undigested fentiments in religious matters. Of propagating, I fay; for the bare entertaining them, without an endeavour to diffuse them, feems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be, with respect to the spiritual cognizance, and fpiritual punishment, of herefy: unless perhaps that the crime ought to be more strictly defined, and no profecution permitted, even in the ecclefiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics; yet not to harafs them with temporal penalties, much less to exterminate or destroy them. The legislature hath indeed thought it proper, that the civil magistrate should again interpose, with regard to one species of heresy, very prevalent in modern times; for by statute 9 & 10 W. III. c. 32. if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that VOL. IV.

there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inslicted on apostacy by the same statute. And thus much for the crime of herefy.

- III. ANOTHER species of offences against religion are those which affect the established church. And these are either positive, or negative: positive, by reviling it's ordinances; or negative, by non-conformity to it's worship. Of both of these in their order.
- 1. And, first, of the offence of reviling the ordinances of the church. This is a crime of a much groffer nature than the other of mere non-conformity; fince it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by fetting up private judgment in virulent and factious oppofition to public authority: arrogance, by treating with contempt and rudeness what has at least a better chance to be right, than the fingular notions of any particular man; and ingratitude, by denying that indulgence and undifturbed liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by statutes I Edw. VI. c. I. and I Eliz. c. I. that whoever reviles the facrament of the lord's supper shall be punished by fine and imprisonment: and by the statute I Eliz. c. 2. if any minister shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the fecond: and, if he be beneficed, he shall for the first offence be imprisoned fix months, and forfeit a year's value of his benefice: for the fecond offence he shall be deprived, and fuffer one year's imprisonment; and, for the third, shall in like manner be deprived, and fuffer imprisonment for life. And if any person whatsoever shall in plays, songs, or other open words, fpeak any thing in derogation, depraying, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in it's stead, he shall forfeit for the first offence an hundred marks; for the fecond, four hundred; and for the third, shall forfeit all his goods and chattels, and fuffer imprisonment for life. These

penalties

penalties were framed in the infancy of our present establishment: when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preferving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too fevere and intolerant; fo far as they are levelled at the offence, not of thinking differently from the national church, but of railing at that church and obstructing it's ordinances, for not submitting it's public judgment to the private opinion of others. For, though it is clear, that no restraint should be laid upon rational and difpassionate discussions of the rectitude and propriety of the established mode of worship; yet contumely and contempt are what no establishment can tolerate v. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and abfurd: but the latter is at prefent the less excusable, because from political reasons, sufficiently hinted at in a former volume w, it would now be extremely unadviseable to make any alterations in the fervice of the church; unless by it's own consent, or unless it can be shewn that some manifest impiety or shocking absurdity will follow from continuing the prefent forms.

2. Non-conformity to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all perfecution and oppression of weak confciences, on the fcore of religious perfuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or found religion. But care must be taken not to carry this indulgence into fuch extremes, as may endanger

v By an ordinance 23 Aug. 1645, worship, subjected the offender upon

w Vol. I. pag. 98.

which continued till the restoration, to indictment to a discretionary fine, not preach, write, or print, any thing in exceeding fifty pounds. (Scobell. 98.) derogation or depraving of the directory, for the then established presbyterian

the national church: there is always a difference to be made between toleration and establishment.

Non-conformists are of two forts: first, such as absent themselves from divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These by the statutes of I Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forseit one shilling to the poor every lord's day they so absent themselves, and 201 to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forseit 101 per month.

THE fecond species of non-conformists, are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted fince the time of the reformation, to be papifts and protestant diffenters: both of which were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papifts divided from it upon material, though erroneous, reasons; but many of the differers upon matters of indifference, or. in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The fin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverieness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclefiaftical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are fuch as threaten ruin or disturbance to the state. He is bound indeed to protect the established church: and, if this can be better effected, by admitting none but it's genuine members to offices of trust and emolument, he is certainly at liberty fo to do; the disposal of offices being matter of favour and discretion. But, this point being once fecured, all perfecution for divertity of opinions, however ridiculous or abfurd they may be, is contrary to every principle of found policy and civil freedom. The names and fubordination of the clergy, the posture of devotion, the materials and colour

of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

WITH regard therefore to protestant dissenters, although the experience of their turbulent disposition in former times occafioned feveral difabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of flatutes x, yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing fchifm, and denied to the church of Englandy. The penalties are conditionally suspended by the statute r W. & M. st. 1. c. 18. " for exempting their majesties protestant " fubjects, diffenting from the church of England, from the " penalties of certain laws," commonly called the toleration act; which is confirmed by statute 10 Ann. c. 2. and declares that neither the laws above-mentioned, nor the ftatutes I Eliz. c. 2. §. 14. 3 Jac. I. c. 4 & 5. nor any other penal laws made against popish recusants (except the test acts) shall extend to any differents, other than papists and fuch as deny the trinity: provided, 1. that they take the oaths of allegiance and fupremacy (or make a fimilar affirmation, being quakers 2) and subscribe the declaration against popery; 2. that they repair to fome congregation certified to and registered in the court of the bishop or archdeacon, or at the county fessions; 3. that the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts. Diffenting teachers, in order to be exempted from the penalties of the statutes 13 & 14 Car. II. c. 4. 15 Car. II. c. 6. 17 Car. II. c. 2. and 22 Car. II. c. 1. are also to subscribe the articles of religion mentioned in the statute 13 Eliz. c. 12. (which only concern the confession of the true christian faith, and the doctrine of the sacraments) with an express exception of those relating to the government

x 23 Eliz. c. 1. 29 Eliz. c. 6. 35 nalties on the former two, in case of Iz. c. 1. 22 Car. H. c. 1. using the book of common-prayer not y The ordinance of 1645 (before- only in a place of public worship, but

Eliz. c. 1. 22 Car. H. c. 1.

cited) inflicted imprisonment for a year also in any private family. on the third offence, and pecuniary pe-

z See stat. 8 Geo. I. c. 6.

and powers of the church, and to infant baptism; or if they scruple subscribing the same, shall make and subscribe the declaration prescribed by statute 19 Geo. III. c. 44. professing themselves to be christians and protestants, and that they believe the scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means univerfally abrogated, it is suspended and ceases to exist with regard to these protestant diffenters, during their compliance with the conditions imposed by these acts: and, under these conditions, all perfons, who will approve themselves no papifts or oppugners of the trinity, are left at full liberty to act as their consciences shall direct them, in the matter of religious worship. And if any person shall wilfully, maliciously, or contemptuously diffurb any congregation, affembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall (by virtue of the same statute 1 W. & M.) be bound over to the fessions of the peace, and forfeit twenty pounds. But by statute 5 Geo. I. c. 4. no mayor or principal magistrate, must appear at any diffenting meeting with the enfigns of his office a, on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility. Diffenters also, who fubscribe the declaration of the act 19 Geo. III. are exempted (unless in the case of endowed schools and colleges) from the penalties of the statutes 13 & 14 Car. II. c. 4. & 17 Car. II. c. 2. which prohibit (upon pain of fine and imprisonment) all persons from teaching school unless they be licenfed by the ordinary, and subscribe a declaration of conformity to the liturgy of the church, and reverently frequent divine service established by the laws of this kingdom.

As to papifts, what has been faid of the protestant dissenters would hold equally strong for a general toleration of them;

Sir Humphry Edwin, a lord mayor which is alluded to by dean Swift, in his

provided

of London, had the imprudence foon tale of a tub, under the allegory of Jack after the toleration act to go to a presby- getting on a great horse, and eating custerian meeting-house in his formalities; tard.

provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowlege a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

LET us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are disabled from taking their lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school under pain of perpetual imprisonment; and, if they willingly fay or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwife, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to refide in any religious house abroad for that purpose, or contributes to their maintenance when there; both the fender, the fent, and the contributor, are difabled to fue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of Rome, or procures others to

D 4

be reconciled, the offence amounts to high treason. 2. Popish reculants, convicted in a court of law of not attending the fervice of the church of England, are subject to the following difabilities, penalties, and forfeitures, over and above those before-mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100/; they can bring no action at law, or fuit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100%. No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recufant, shall forfeit two thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10 % a month, or the third part of all his lands. And laftly, as a feme-covert recufant may be imprisoned, fo all others must, within three months after conviction, either submit and renounce their errors, or, if required fo to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy, (refusing to make the declaration against popery enjoined by statute 30 Car. II. st. 2. when tendered by the proper magistrate) which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any feat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being t, of a lay papist. But, 3. The remaining species or de-

b Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. II. ft. 2. 1 W. & M. c. 9. 15, & 26. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. 11 & 12 W. III. c. 4. 12 Ann. ft. 2. c. 4. 3 Jac. I. c. 4 & 5. 7 Jac. I. c. 6. c. 14. 1 Geo. I. ft. 2. c. 55. 3 Gec. I. g Car. I. c. 3. 25 Car. II. c. 2. 30 Car. c. 18. 11 Geo. II. c. 17.

gree, viz. popish priests, are in a still more dangerous condition. For by statute 11 & 12 W. III. c. 4. popish priests or bishops, celebrating mass or exercising any part of their functions in England, except in the houses of embassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, (unless driven by stress of weather and tarrying only a reasonable time of the oaths, is guilty of high treason: and all persons harbouring him are guilty of selony without the benefit of clergy.

This is a fhort fummary of the laws against the papists. under their three feveral classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes d, that they are fo rigorous, though not professedly of the fanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing fystem of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneafiness of the papifts under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract fod angerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into James I, which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I, the prospect of a popish succeffor in that of Charles II, the affaffination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the

s Raym. 377. Latch. z.

d Sp. L. b. 19. c. 27.

extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all sears of a pretender shall have vanished, and the power and influence of the pope shall become seeble, ridiculous, and despicable, not only in England but inevery kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the civil principles of the roman catholics called again upon the legislature to renew them: for it ought not to be lest in the breast of every merciles bigot, to drag down the vengeance of these occasional laws upon inossensive, though mistaken, subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

This hath partly been done by flatute 18 Geo. III. c. 60. with regard to fuch papifts as duly take the oath therein preferibed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhormence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only, the statute of 11 & 12 W. III. is repealed, so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth.

In order the better to secure the established church against perils from non-conformists of all denominations, insidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the corporation and test acts: by the former of which on person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvementh before, he has received the sacrament of the lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void. The other, called the test act s, directs all officers civil and military to take the oaths and make the declaration against transfubstantiation, in any of the king's of Stat. 13 Car. II. st. 2. c. 1. Stat. 25 Car. II. c. 2. explained by 9 Geo. II. c. 26.

courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500%, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c. 2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, pro salute animae; while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

IV. The fourth species of offences therefore, more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our faviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment s: for christianity is part of the laws of England b.

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common fwearing and

3 1 Hawk. P. C. 7.

h 1 Vent. 293. 2 Strange. 834.

curfing. By the last statute against which, 19 Geo. II. c. 21. which repeals all former ones, every labourer, failor, or foldier profanely curfing or swearing shall forfeit 15, every other person under the degree of a gentleman 2, and every gentleman or person of superior rank 5 s, to the poor of the parish; and, on a second conviction, double; and, for every fubsequent offence, treble the sum first forseited; with all charges of conviction: and in default of payment shall be fent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness: and any constable or peace officer, upon his own hearing, may fecure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5 1, and the constable 40 s. And the act is to be read in all parish churches, and public chapels, the funday after every quarter day, on pain of 5 l to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c. 21. that if in any stage play, interlude, or shew, the name of the holy trinity, or any of the persons therein, be jeftingly or profanely used, the offender shall forfeit 10/; one moiety to the king, and the other to the informer.

VI. A SIXTH species of offences against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of witchcraft, conjuration, inchantment, or forcery. To deny the possibility, nay, actual existence of witchcraft and forcery, is at once flatly to contradict the revealed word of God, in various passages both of the old and new testament: and the thing itself is a truth to which every nation in the world hath in it's turn borne testimony, either by examples seemingly well attested, or by prohibitory laws; which at least suppose the posfibility of a commerce with evil spirits. The civil law punishes with death not only the forcerers themselves, but also those who confult them i; imitating in the former the express law of Godk, "thou shalt not suffer a witch to live." And our own laws, both before and fince the conquest, have been equally penal; ranking this crime in the fame class with herefy, and condemning both to the flames. The president Montesquieu m ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and herefy; because the most unexceptionable conduct, the purest morals and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own n, that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

Our forefathers were stronger believers, when they enacted by statute 33 Hen. VIII. c. 8. all witchcraft and forcery to be felony without benefit of clergy; and again by flatute 1 Jac. I. c. 12. that all perfons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, forcery, charm, of inchantment; or killing or otherwife hurting any person by fuch infernal arts; should be guilty of felony without benefit of clergy, and fuffer death. And, if any person should attempt by forcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beaft, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the fecond. These acts continued in force till lately, to the terror of all ancient females-in the kingdom: and many poor wretches were facrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by fome means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wife example of Louis XIV. in France, who thought proper by an edict to re-

<sup>1 3</sup> Inft. 44.

n Mr. Addison, Spect. No. 117.

m Sp. L. b. 12. c. 5.

strain the tribunals of justice from receiving informations of witchcraft o. And accordingly it is with us enacted by statute o Geo. II. c. 5. that no profecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or inchantment. But the misdemesnor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.

VII. A SEVENTH species of offenders in this class are all religious impostors: fuch as falfly pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment P.

VIII. Simony, or the corrupt presentation of any one to an ecclefiaftical benefice for gift or reward, is also to be confidered as an offence against religion; as well by reason of the facredness of the charge which is thus profanely bought and fold, as because it is always attended with perjury in the perfon presented q. The statute 31 Eliz. c. 6. (which, so far as it relates to the forfeiture of the right of prefentation, was confidered in a former book r) enacts, that if any patron, for money or any other corrupt confideration or promife, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will fue for the fame. If persons also corruptly refign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt confideration. And perfons who shall corruptly ordain or licence any minister, or procure him to be ordained or licenced (which is the true idea of fimony) shall incur a like forfeiture of forty pounds; and the minister

o Voltaire Siecl. Louis xiv. ch. 29. the crimes punishable in France. Mod Un. Hift. xxv. 215. Yet Voughlans (de droit criminel, 353. 459.) ftill reckons up forcery and witchcraft among

P 1 Hawk. P. C. 7.

<sup>9 3</sup> Inft. 156.

r See Vol. II. p. 279.

himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the lord's day, vulgarly (but improperly) called fabbath-breaking, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal, of permitting any fecular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows it's profanation, the keeping one day in feven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwife degenerate into a fordid ferocity and favage felfishness of spirit: it enables the industrious workman to purfue his occupation in the enfuing week with health and chearfulness: it imprints on the minds of the people that fense of their duty to God, fo necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their maker. And therefore the laws of king Athelstan forbad all merchandizing on the lord's day, under very fevere penalties. And by the statute 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, good friday, or any funday, (except the four fundays in harvest) on pain of forfeiting the goods exposed to sale. And, fince by the ftatute I Car. I. c. 1. no perfon shall affemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other unlawful exercises, or pastimes; on pain that every offender shall pay 35 4d to the poor. This ftatute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their

respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to work on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on sorfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings (b).

X. Drunkenness is also punished by statute 4. Jac. I. c. 5. with the forseitnre of 5s; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of king James I, which regulate the licencing of ale-houses, and punish persons sound tippling therein; or the masters of such houses permitting them.

XI. THE last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious levelness: either by frequenting houses of ill same, which is an indict-

<sup>(</sup>b) [By statute 21 Geo. 3. c.49. it is enacted, that any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, within the cities of London or Westminster, or in the neighbourhood thereof, upon any part of the lord's day called funday, and to which perfons shall be admitted by the payment of money, or by tickets fold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of 2001. for every day that fuch house, room, or place shall be opened or used as aforesaid on the lord's day, to fuch person as will she for the same; and be otherwise punishable as the law directs in cases of disorderly houses; and the perfon managing or conducting fuch entertainment or amusement on the lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the lord's day, shall likewise for every such offence forfeit the sum of 100%. to fuch person as will sue for the same; and every door keeper, servant, or other perion who shall collect or receive money or tickets from persons affembling at such house, room, or place on the lord's day, or who shall deliver out tickets for admitting persons to such house, room, or place on the lord's day, shall also forseit the sum of 50 l. to such perfon as will fue for the fame : and that any perfon advertifing or cauting to be advertised any public entertainment or amusement, or any public meeting for debating on any subject whatsoever, on the lord's day, to which persons are to be admitted by the payment of money, or by tickets fold for money; and any person printing or publishing any such adver-titement, shall respectively forseit the sum of 50% for every such offence, to any person who will sue for the same.] able

able offence t; or by some grossly seandalous and public indecency, for which the punishment is by fine and imprisonment ". In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a fecond conviction) made felony without benefit of clergy w. But at the restoration, when men, from an abhorrence of the hypocrify of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of fuch unfashionable rigour. And these offences have been ever fince left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of it's first compilers. The temporal courts therefore take no cognizance of the crime of adultery. otherwise than as a private injury x.

Bur, before we quit this subject, we must take notice of the temporal punishment for having bastard children, considered in a criminal light; for with regard to the maintenance of fuch illegitimate offspring, which is a civil concern, we have formerly spoken at large y. By the statute 18 Eliz. c. 3. two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be is not therein afcertained; though the contemporary exposition was, that a corporal punishment was intended 2. By statute 7 Jac. I. c. 4. a specific punishment (viz. commitment to the house of correction) is inflicted on the woman only. But in both cases, it seems that the penalty can only be inslicted, if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a fecond offence, till she find fureties never to offend again.

t Poph. 208.

u 1 Siderf. 163.

w Scobell. 121.

Vol. IV.

x See Vol. III. pag. 139.

y See Vol. I. pag. 458.

z Dalt, just, ch. 11.

### CHAPTER THE FIFTH.

# OF OFFENCES AGAINST THE LAW OF NATIONS.

A CCORDING to the method marked out in the preceding chapter, we are next to confider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

The law of nations is a fystem of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those

<sup>2</sup> Ff. 1. 1. 9.

b See Vol. I. pag. 43.

c Sp. L. b. 1. c. 2.

principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but fince in England no royal power can introduce a new law, or fuspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's decifions, are not to be confidered as introductive of any new rule, but merely as declaratory of the old fundamental conftitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, fuch as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, infurances, bottomry, and others of a fimilar nature; the law-merchantd, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

Bur, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall

4 See Vol. I. pag. 273.

within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish fuch infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to refort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming feverity, that the peace of the world may be For in vain would nations in their collective maintained. capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

THE principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy.

I. As to the first, violation of fafe-conducts or passports, expressly granted by the king or his embassadors to the subjects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public saith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of

the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any fafe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of magna carta f, that foreign merchants should be entitled to fafe-conduct and fecurity throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own fafe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V. st. 1. c. 6. breaking of truce and fafe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and impowered to hear and determine fuch treasons (when committed at sea) according to the antient marine law then practifed in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the fame treasons, when committed within the body of any county. Which statute, fo far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the same powers to the lord chancellor, affociated with either of the chief justices, as belonged to the confervators of truce and their accessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted by the flatute 131 Hen. VI. c. 4. that if any of the king's subjects attempt or offend, upon the fea, or in any port within the king's obeyfance, against any stranger in amity, league, or truce, or under fafe-conduct; and especially by attaching

f 9 Hen. III. c. 70. See Vol. I. pag. 259, &c.

his person, or spoiling him or robbing him of his goods; the lord chancellor with any of the justices of either the king's-bench, or common pleas, may cause full restitution and amends to be made to the party injused.

IT is to be observed, that the suspending and repealing acts of 14 & 20 Hen. VI, and also the reviving act of 29 Hen. VI, were only temporary; so that it should seem that, after the expiration of them all, the statute 2 Hen. V. continued in sull force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4. which revives and confirms all statutes and ordinances, made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. But (however that may be) I apprehend it was sinally repealed by the general statutes of Edward VI and queen Mary, for abolishing new-created treasons; though sir Matthew Hale seems to question it as to treasons committed on the seas. But certainly the statute of 31 Hen. VI, remains in full force to this day.

II. As to the rights of embassadors, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large b. It may here be fufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train, And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann. c. 12. that all process whereby the person of any embassador, or of his domestic or domestic servant, may be arrested, or his goods distreined or feifed, shall be utterly null and void; and that all persons profecuting, foliciting, or executing fuch process, being convicted by confession or the oath of one witness, before the

lord chancellor and the chief justices; or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think sit. Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. Lastly, the crime of piracy, or robbery and depredation upon the high feas, is an offence against the universal law of society; a pirate being, according to fir Edward Coke k, hostis humani generis. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inslict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

By the antient common law, piracy, if committed by a fubject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien, to be selony only: but now, since the statute of treasons, 25 Edw. III. c. 2. it is held to be only selony in a subject. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. VIII. c. 15. established a new jurisdiction for this purpose; which proceeds according to the course of the common law, and of which we shall say more hereafter.

i See the occasion of making this flatute; Vol. I. pag. 255.

I lid.

m I Hawk. P.C. 98.

k 3 Inft. 113.

THE offence of piracy, by common law, confifts in committing those acts of robbery and depredation upon the high feas, which, if committed upon land, would have amounted to felony there ". But, by statute, some other offences are made piracy also: as, by statute 11 & 12 W. III. c. 7. if any natural born subject commits any act of hostility upon the high feas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a fubject. And farther, any commander, or other feafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person affaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I. c. 11. expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I. c. 24. the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any veffel for that purpose, or in any wife confulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant veffel, though without feifing or carrying her off, and destroying or throwing any of the goods over board; shall be deemed piracy: and such accessories to piracy as are described by the statute of king William, are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the same statutes also, (to encourage the defence of merchant veffels against pirates) the commanders or seamen wounded, and the widows of fuch feamen as are flain, in any piratical engagement, shall be entitled to a bounty, to

be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and fuch wounded feamen shall be entitled to the pension of Greenwich hospital; which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not desending the ship, if she carries guns or arms, or shall discharge the mariners from sighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment. Lastly, by statute 18 Geo. II. c.30. any natural born subject, or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

These are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed in the next chapter to consider offences, which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent, than either of those of which we have already treated.

#### CHAPTER THE SIXTH.

## OF HIGH TREASON.

HE third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his fovereign. In a former part of these commentaries \* we had occasion to mention the nature of allegiance, as the tie or ligamen which binds every subject to be true and faithful to his fovereign liege lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegianec, we may remember, was diftinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by refidence: and thefe may be diffinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. Praemunire. 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

TREASON, proditio, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, faith the Mirror b: for treafon is indeed a general appellation, made nse of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a fubject or inferior, between whom and himfelf there fubfifts a natural, a civil, or even a spiritual relation; and the inferior fo abuses that confidence, fo forgets the obligations of duty, fubjection, and allegiance, as to destroy the life of any fuch fuperior or lord c. This is looked upon as proceeding from the fame principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclefiaftic his lord or ordinary; thefe, being breaches of the lower allegiance, of private and domestic faith, are denominated petit treasons. But when disloyalty so rears it's crest, as to attack even majesty itself, it is called by way of eminent diffinction high treason, alta proditio; being equivalent to the crimen laesae majestatis of the Romans, as Glanvil denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power. And yet, by the antient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into

b c. 1. §. 7.
c LL. Aelfredi. c. 4. Actbelft. c. 4. c Sp. L. b. 12. c. 7.
Snuti. c. 54. 61.

the crime and punishment of treason, which never were sufpected to be fuch. Thus the accroaching, or attempting to exercife, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly affaulted and detained one of the king's subjects till he paid him golf: a crime, it must be owned, well deserving of punishment: but which feems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his meffenger, has also fallen under the fame denomination g. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or defigns against the ministers of the prince shall be treafon h. But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the lex Julia majestatis among the Romans, promulged by Augustus Caesar, comprehended al the antient laws, that had before been enacted to punish transgressors against the state i. This statute must therefore be our text and guide, in order to examine into the feveral fpecies of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

I. "WHEN a man doth compass or imagine the death of " our lord the king, of our lady his queen, or of their eldest " fon and heir." Under this description it is held that a queen regnant (fuch as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects i: but the husband of such a queen is not comprized within these words,

<sup>1</sup> Hal. P. C. 80.

consiliis et confisteria nostro intersunt, senatorum etiam (nam et ipfi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiseum, cogitaverit : feadem enim

severitate voluntatem sceleris, qua effectum, 8 Britt. c. 22. I Hawk, P. C. 34. puniri jura voluerint ) ipfe quidem, utpote h Qui de nece virorum illustrium, qui majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis. (Cod. 9. 8.5.)

i Gravin. Orig. 1. §. 34.

j 1 Hal. P. C. 101.

and therefore no treason can be committed against him k. The king here intended is the king in possession, without any respect to his title: for it is held, that a king de facto and not de jure, or in other words an usurper that hath got possesfion of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public : and therefore treafons committed against Henry VI. were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king de jure and not de facto, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed1. And a very fensible writer on the crown-law carries the point of possession fo far, that he holds m, that a king out of possession is fo far from having any right to our allegiance, by any other title which he may fet up against the king in being, that we are bound by the duty of our allegiance to refift him. doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do affift and obey a king de facto. But, in truth, this feems to be confounding all notions of right and wrong; and the confequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the fon's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, (a term, by the way, of very loose and indiffinct fignification) the fubject would be bound by his allegiance to fight for his natural prince to-day, and by the fame duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry

k 3 Inst. 7. 1 Hal. P. C. 106.

m 1 Hawk. P. C. 36.

<sup>1 3</sup> Inft. 7. 1 Hal. P. C. 104.

the feventh does by no means command any opposition to a king de jure; but excuses the obedience paid to a king de facto. When therefore a usurper is in possession, the fubject is excused and justified in obeying and giving him asfistance: otherwise, under a usurpation, no man could be fafe; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay farther, as the mass of people are imperfect judges of title, of which in all cases possession is prima facie evidence, the law compels no man to yield obedience to that prince, whose right is by want of poffession rendered uncertain and disputable, till providence shall think fit to interpole in his favour, and decide the ambiguous claim: and therefore, till he is entitled to fuch allegiance by poffeffion, no treason can be committed against him. Lastly, a king who has refigned his crown, fuch refignation being admitted and ratified in parliament, is according to fir Matthew Hale no longer the object of treason ". And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: fince, as was formerly observed o, when the fact of abdication is once established, and determined by the proper judges, the confequence necessary follows, that the throne is thereby yacant, and he is no longer king.

LET us next see, what is a compassing or imagining the death of the king, &c. These are synonymous terms; the word compass signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. And therefore an accidental stroke, which may mortally wound the sovereign, per infortunium, without any traiterous intent, is no treason: as was the case of sir Walter Tyrrel, who, by the command of king William Rusus,

n 1 Hal. P. C. 104.

o Vol. I. pag. 212.

P By the antient law compassing or intending the death of any man, demon-

strated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

<sup>9 1</sup> Hal. P. C. 107.

shooting at a hart, the arrow glanced against a tree, and killed the king upon the fpot . But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by fome open, or overt, act. And yet the tyrant Dionysius is recorded s to have executed a fubject, barely for dreaming that he had killed him; which was held for a fufficient proof, that he had thought thereof in his waking hours. But fuch is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or overt act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused "be thereof upon sufficient proof " attainted of some open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death t. To conspire to imprison the king by force, and move towards it by affembling company, is an overt act of compassing the king's death "; for all force, used to the person of the king, in it's consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their fovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question also, but that taking any measures to render such treasonable purposes effectual, as affembling and consulting on the means to kill the king, is a fufficient overt act of high-treason w.

How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the fourth,

r 3 Inft. 6.

s Plutarch. in vit.

<sup>\$ 3</sup> Inft. 12.

<sup>&</sup>quot; 1 Hal. P. C. 109.

<sup>₩ 1</sup> Hawk. P. C. 38. 1 Hal. P. C.

<sup>119.</sup> 

of persons executed for treasonable words: the one a citizen of London, who faid he would make his fon heir of the crown, being the fign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice Markham rather chose to leave his place than affent to the latter judgment x. But now it feems clearly to be agreed, that, by the common law and the statute of Edward III, words fpoken amount only to a high mifdemesnor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may fignify differently even according to the tone of voice, with which they are delivered; and fometimes filence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreafonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning fome very atrocious words fpoken by one Pyne, they certified to the king, " that though the words were as wicked " as might be, yet they were no treason: for, unless it be " by fome particular statute, no words will be treason y." If the words be fet down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for scribere est agere. But even in this case the bare words are not the treason, but the deliberate act of writing them. And fuch writing, though unpublished, has in some arbitrary reigns convicted it's author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a fermon never preached z; and of Algernon Sydney, for some papers found in his clofet: which, had they been plainly relative to any previous formed defign of dethroning or murdering the king, might doubtless have been properly read in evidence as overt

x 1 Hal. P. C. 115.

Y Cro. Car. 125.

z Ibid.

acts of that treason, which was specially laid in the indictment. But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned: and though Sidney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overtact of treason at the common law b; though of late even that has been questioned.

2. THE second species of treason is, "if a man do vio-" late the king's companion, or the king's eldeft daughter " unmarried, or the wife of the king's eldest fon and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be confenting; as fome of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any fuspicion of bastardy, whereby the fuccession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princefs dowager is held to be no treason c: in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vafal vitiated the wife or daughter of his lord 4; but not fo, if he only vitiated his widow c.

3. The third species of treason is, "if a man do levy "war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws (c), or to

a Foster. 198. d Feud. l. 1. 1. 5.

b 1 Hal. P. C. 118. 1 Hawk. P. C. 38. c Ibid. t. 21.

c 3 Inft. 9.

<sup>(</sup>c) [So an attempt by intimidation and violence to force the repeal of law, is a levying war against the king; and high treason, so laid down by the whole court of K. B. as clear law in the king v. lord George Gordon, Hill. term, 21 Geo. III. K. B. Dougl. 570.]

Vol. IV. F remove

remove evil counsellors, or other grievances whether real or pretended f. For the law does not, neither can it, permit any private man, or fet of men, to interfere forcibly in matters of fuch high importance; especially as it has established a fufficient power, for these purposes, in the high court of parliament: neither does the conflitution justify any private or particular refistance for private or particular grievances; though in cases of national oppression the nation has very justifiably rifen as one man, to vindicate the original contract fubfifting between the king and his people. To refift the king's forces by defending a castle against them, is a levying of war: and fo is an infurrection with an avowed defign to pull down all inclosures, all brothels, and the like; the univerfality of the design making it a rebellion against the state, an usurpation of the powers of government, and an infolent invasion of the king's authority 2. But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two fubjects quarrel and levy war against each other, (in that spirit of private war, which prevailed all over Europe h in the early feodal times) it is only a great riot and contempt, and no treafon. Thus it happened between the earls of Hereford and Glocester in 20 Edw. I, who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the lofs of many lives: yet this was held to be no high treason, but only a great misdemesnor j. conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death i.

4. "If a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or "elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by fending them provisions, by felling them arms, by treacherously surrendering a fortress, or the

f 1 Hawk. P. C. 37.

j 1 Hal. P. C. 136.

<sup># 1</sup> Hal. P. C. 132.

<sup>1 3</sup> Inft. 9. Fofter. 211. 213.

h Robertson Cha. V. i. 45. 286.

like k. By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any affiftance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom 1, or else in that of levying war against his majesty. most indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king m. But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England n. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a fafe opportunity ".

5. "IF a man counterfeit the king's great or privy feal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for non-tesidence. But the knavish artistice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He

k 3 Inft. 10.

<sup>1</sup> Fofter. 219.

m Ibid. 216.

n 1 Hawk. P. C. 38.

º Foster. 216.

then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and sir Edward Coke p mentions it with some indignation, that the party was living at that day.

6. The fixth species of treason under this statute, is "if a man counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandize and make payment withal." As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within the statute q. With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute. But of this we shall presently say more.

7. The last species of treason ascertained by this statute, is "if a man slay the chancellor, treasurer, or the king's "justices of the one bench or the other, justices in eyre, or "justices of assise, and all other justices assigned to hear and "determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the exchequer, as such, are not within the protection of this act s: but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Eliz. c. 18. and 1 W. & M. c. 21.

r 3 Inft. 16.

<sup>\*</sup> Ibid. 43. \* 1 Hal. P. C. 231.

Thus careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other like cases of treason may happen in time to come. " which cannot be thought of nor declared at present, it is " accorded, that if any other case supposed to be treason. " which is not above specified, doth happen before any " judge; the judge shall tarry without going to judgment of " the treason, till the cause be shewed and declared before " the king and his parliament, whether it ought to be judg-" ed treason, or other felony." Sir Matthew Hale ' is very high in his encomiums on the great wifdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not fuffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason; but referving them to the decision of parliament. This is a great fecurity to the public, the judges, and even this facred act itself; and leaves a weighty memento to judges to be careful and not overhafty in letting in treasons by construction or interpretation, especially in new cases that have not been refolved and fettled. 2. He observes, that as the authoritative decision of these casus omissi is referved to the king and parliament, the most regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

In consequence of this power, not indeed originally granted by the statute of Edward III, but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the second: as, particularly, the killing of an embassador was made so; which seems to be founded upon better reason than the mul-

titude of other points, that were then strained up to this high offence: the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3. which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was paffed ", " reciting, " that no man knew how he ought to behave himself, to do, speak, or say, for "doubt of fuch pains of treason: and therefore it was ac-" corded, that in no time to come any treason be judged, otherwise than was ordained by the statute of king Edward " the third." This at once fwept away the whole load of extravagant treasons introduced in the time of Richard the fecond.

Bur afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of clipping money; breaking prison or refcue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welchmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the fign manual or fignet; refufing to abjure the pope; deflowering, or marrying without the royal licence, any of the king's children, fifters, aunts, nephews, or nieces; bare folicitation of the chaftity of the queen or princefs, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him fuch her unchaste life; judging or believing (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal stile and title; impugning his fupremacy; and affembling riotously to the number of twelve, and not dispersing upon proclamation: all which new-fangled treafons were totally abrogated by the

statute 1 Mar. c. 1. which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased, as we shall find upon a short review.

THESE new treasons, created since the statute 1 Mar. c. 1, and not comprehended under the description of statute 25 Edw. III, I shall comprize under three heads. 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the protestant succession in the house of Hanover.

I. THE first species, relating to papists, was considered in a preceding chapter, among the penalties incurred by that branch of non-conformists to the national church; wherein we have only to remember, that by statute 5 Eliz. c. 1. to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemesnor; and, if the offence be repeated, it is high treason. Also by statute 27 Eliz. c. 2. if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the feas, unless driven by stress of weather w, and departing in a reasonable time x; or shall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high trea-And by statute 3 Jac. I. c. 4. if any natural-born subject be withdrawn from his allegiance, and reconciled to the pope or see of Rome, or any other prince or state, both he and all fuch as procure fuch reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to, as spiritual offences, and I now repeat them as temporal ones also; the reason of distinguishing these overt-acts of popery from all others, by fetting the mark of high treason upon them, being certainly on a civil, and not on a religious, account. For every popish priest of course renounces his allegiance to his temporal fovereign upon taking orders; that being inconfiftent with his new engagements of canonical obedience to the pope: and the fame may be faid of an obstinate defence of his authority here, or a formal re-

w Sir T. Raym. 377.

conciliation to the fee of Rome, which the statute construes to be a withdrawing from one natural allegiance; and therefore, besides being reconciled "to the pope," it also adds "or any other prince or state."

2. WITH regard to treasons relative to the coin or other royal fignatures, we may recollect that the only two offences respecting the coinage; which are made treason by the statute 25 Edw. III, are the actual counterfeiting the gold and filver coin of this kingdom; or the importing fuch counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and affuming one of the attributes of the fovereign, to whom alone it belongs to fet the value and denomination of coin made at home, or to fix the currency of foreign money: and befides, as all money which bears the stamp of the kingdom is fent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falfifies this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine, false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens 2, all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practifed, rather for the fake of private and unlawful lucre, than out of any difaffection to the fovereign. And therefore both this and it's kindred species of treason, that of counterfeiting the feals of the crown or other royal fignatures, feem better denominated by the later civilians a branch of the crimen falfi or forgery (in which they are followed by Glan-

vil,

Y G. 9. 24. 2. Ced. Theed. de falfa 2 Pott. Ant. b. 1. c. 26.

vil a, Bracton b, and Fleta c) than by Constantine and our Edward the third, a species of the crimen laesae majestatis or high treason. For this consounds the distinction and proportion of offences; and, by assign the same ideas of guilt upon the man who coins a leaden groat and him who assissing the attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III, the offence of counterfeiting the coin was held to be only a species of petit treason d: but subsequent acts in their new extensions of the offence have followed the example of that statute, and have made it equally high treason with an endeavour to subvert the government, though not quite equal in it's punishment.

In consequence of the principle thus adopted, the statute 1 Mar. c. 1. having at one stroke repealed all intermediate treason created since the 25 Edw. III, it was thought expedient by flatute 1 Mar. ft. 2. c. 6. to revive two species thereof; viz. 1. That if any person falsely forge or counterfeit any fuch kind of coin of gold or filver, as is not the proper coin of this realm, but shall be current within this realm by confent of the crown; or, 2. shall falfely forge or counterfeit the fign manual, privy fignet, or privy feal; fuch offences shall be deemed high treason. And by statute 1 & 2 P. & M. c. 11. if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the fame to be false, with intent to utter the same in payment. they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by confent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is not high treason, but another inferior offence. Clipping or defacing the genuine coin was not hitherto included in these statutes: though an offence equally pernicious to trade, and an equal

<sup>· 1. 14.</sup> c. 7.

c 1. 1. c. 22.

d I Hal. P. C. 224.

infult upon the prerogative, as well as personal affront to the fovereign; whose very image ought to be had in reverence by all loyal fubjects. And therefore, among the Romans e, defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like fort, according to that vague conclusion, " aliudve quid simile si admiserint." And now, in England. by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's fake, any of the money of this realm, or other money fuffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1. (because "the fame law, being penal, ought to be taken and expounded ftrictly according to the words thereof, and the like of-" fences, not by any equity to receive the like punishment or " pains") the same species of offence is therefore described in other more general words; viz. impairing, diminishing, falfifying, fcaling, and lightening; and made liable to the fame penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, thall knowingly make or mend, or affift in fo doing, or shall buy, fell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. all profecutions on this act are to be commenced within three months after the commission of the offence: except those for making or mending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within fix months after the offence committed f. And, lastly, by statute 15 & 16 Geo. II. c. 28. if any perfon colours or alters any shilling or sixpence, either lawful or

e Ff. 48. 4. 6.

f Stat. 7 Ann. c. 25.

counterfeit, to make them respectively resemble a guinea or half guinea; or any halfpenny or farthing to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

3. THE other new species of high treason is such as is created for the security of the protestant succession over and above fuch treafons against the king and government as were comprized under the statute 25 Edw. III. For this purpose, after the act of fettlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by flatute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had affumed the title of king James III, should be attainted of high treafon; and it was made high treason for any of the king's subjects by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service-And by statute 17 Geo. II. c. 39. it is enacted, that if any of the fons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the fame, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute I Ann. st. 2. c. 17. if any person shall endeavour to deprive or hinder any person, being the next in fuccession to the crown according to the limitations of the act of fettlement, from fucceeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and flatutes, to bind the crown and the descent thereof; such person shall be guilty

of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. t. during the life of that princess. And after her decease it continued a high misdemesnor, punishable with forseiture of goods and chattels, even in the most slourishing aera of indeseasible hereditary right and jure divino succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet entitled von populi von Dei."

Thus much for the crime of treason, or laesae majestatis, in all it's branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this it's primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing it's punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance b, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.

THE king may, and often doth, discharge all the punishment, except beheading, especially where any of noble

g State Tr. IX. 680.

divers examples in fcripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and fo of the rest. (3 Inst. 211.)

h 33 Aff. pl. 7.

j 1 Hal. P. C. 382.

i This punishment for treason, fir (3 Inst. 211.) Edward Coke tells us, is warranted by

blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command k. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another. But of this we shall say more hereaster m.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead. But in treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the sull as terrible to sensation as the other) is to be drawn to the gallows, and there to be burned alive o(a).

THE consequences of this judgment, (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

k 1 Hal. P. C. 351.

<sup>1 3</sup> Inft. 52.

m See ch. 32.

n 1 Hal. P. C. 351.

o 2 Hal. P. C. 399.

<sup>(</sup>a) [But now by statute 30 Geo. III. c. 48. it is enacted, that the judgment to be given and awarded against any woman convicted of the crime of high treason, or of the crime of petit treason, or of abetting, procuring, or counfelling any petit treason, shall not be that such woman shall be drawn to the place of execution and be there burned to death, but that fuch woman shall be drawn to the place of execution and be there hanged until she be dead. And by the second clause of the faid statute it is enacted, that if any woman shall be convicted of petit treason, or of abetting, procuring, or counfelling any petit treason, then such woman shall be subject and liable to such further pains and penalties as are particularly specified and declared with respect to persons convicted of wilful murder by statute 25 Geo. II. c. 37. and the court shall pass fentence at fuch time, and shall give such orders with respect to the time of execution, and all fuch other matters and things as are directed to be given by the faid act with respect to persons convicted of wilful murder.]

### CHAPTER THE SEVENTH.

# OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

As, according to the method I have adopted, we are next to confider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of felony; before we proceed upon any of the particular branches, into which it is divided.

Felony, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were antiently punished with death, in all lay, or unlearned, offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treafon itself, says sir Edward Coke<sup>2</sup>, was antiently comprized under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edw. III. c. 2. speaking of some dubious crimes, directs a reference to parliament;

that it may be there adjudged, "whether they be treason, or other felony." All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forseitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; viz. an offence which occasions a total forseiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word felony, or felonia, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c. but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek, onlos, an impostor or deceiver; others from the Latin, fallo, fefelli, to countenance which they would have it called fal-Sir Edward Coke, as his manner is, has given us a ftill stranger etymology b; that it is crimen animo felleo perpetratum, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occafions a forfeiture of all the offender's lands, or goods. And this gives great probability to fir Henry Spelman's Teutonic or German derivation of it : in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's fignification, than among the Greeks and Romans. Fe-lon then, according to him, is derived from two northern words; fee, which fignifies (we well know) the fief, feud, or beneficiary estate: and ton, which signifies price or value. Felony is therefore the same as pretium feudi, the considera-

tion for which a man gives up his fief; as we fay in common fpeech, fuch an act is as much as your life, or estate, is worth. In this fense it will clearly fignify the feodal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates d, are stiled felonia in the feodal law: " scilicet, per " quas feudum amittiture." As, " fi domino defervire nolue-" rit ; fi per annum et diem cessaverit in petenda investitura ; " fi dominum ejuravit, i. e. negavit se a domino feudum habere h; " fi a domino, in jus eum vocante, ter citatus non comparueriti; all thefe, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feodal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as affaulting or beating the lord k; vitiating his wife or daughter, " fi dominum cucurbitaverit, i. e. cum unore " ejus concubuerit 1;" all these are esteemed felonies, and the latter is expressly fo denominated, " fi fecerit feloniam, do-" minum forte cucurbitando "." And as these contempts, or fmaller offences, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the fame denomination. On the other hand, the lord might be guilty of felony, or forfeit his feignory to the vafal, by the fame acts as the vafal would have forfeited his feud to the lord. " Si dominus commist feloniam, perquam vasallus amitteret feudum " fi eam commiserit in dominum, feudi proprietatem etiam dominus " perdere debet "." One instance given of this fort of felony in the lord is beating the fervant of his vafal, fo as that he lofes his fervice; which feems merely in the nature of a civil

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d See Vol. II. pag. 284.

<sup>9</sup> Feud. 1. 2. t. 16. in calc.

f Feud. l. 1. t. 21.

<sup>&</sup>amp; Feud 1. 2. 1. 24.

i Feud. 1. 2. t. 22.

k Feud. l. 2. t. 24. 5. 2.

<sup>1</sup> Feud. 1. 1. t. 5.

m Feud. l. 2. t. 38. Britton. l. 1. c. 22.

h Fend. l. 2. t. 34. l. 2. t. 26. §. 3. n Feud. l. 2. t. 26 & 47.

injury, fo far as it respects the vasal. And all these felonies were to be determined "per laudamentum sive judicium parium "fuorum" in the lord's court; as with us forseitures of copyhold lands are presentable by the homage in the court-baron.

Felony, and the act of forfeiture to the lord, being thus fynonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small desexion from the original sense, such as induced the forfeiture of goods also) were denominated selonies. Thus it was said, that suicide, robbery, and rape, were selonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of selony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in antient times was held to be a species of selony; viz. because it induced a forseiture.

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in case of herefy by the common law, which, though capital, never worked any forfeiture of lands or goods o, an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore fuch standing mute was no felony. In short the true criterion of felony is forfeiture; for, as sir Edward Coke justly observes p, in all felonies which are punishable with death, the offender loses all his lands in feesimple, and also his goods and chattels; in such as are not fo punishable, his goods and chattels only.

e 3 Inft. 43.

P 1 Inft. 391.

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THE idea of felony is indeed fo generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law q implies that it shall be punished with death, viz. by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the fame is not expressly taken away by statute. And, in compliance herewith, I shall for the future confider it also in the same light, as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which feem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death: whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I PROCEED now to confider fuch felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of imbezzling or destroying the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. OFFENCES relating to the coin, under which may be ranked some inferior misdemessnors not amounting to selony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By statute 9 Edw. III. st. 2. no sterling money shall be melted down, upon pain of forfeiture thereof.

By ftatute 17 Edw. III. none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting fuch importation. By statute 3 Hen. V. st. 1. to make, coin, buy, or bring into the realm any gally-halfpence, fuskins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or blanks is forfeiture of an hundred shillings. By statute 14 Eliz. c. 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason: a crime which we shall hereafter consider. By statute 13 & 14 Car. II. c. 31. the offence of melting down any current filver money shall be punished with forfeiture of the fame, and also the double value: and the offender, if a freeman of any town, shall be disfranchifed; if not, shall fuffer fix months imprisonment. By statute 6 & 7 W. III. c. 17. if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 5001; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 & 9 W. III. c. 26. if any person shall blanch, or whiten, copper for fale; (which makes it refemble filver) or buy or fell or offer to fale any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard: or if any person shall receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of it's baseness, and a fraudulent defign) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; an operation which is expressly directed to be performed when any fuch money shall be produced in evidence, and which any person, to whom any gold or filver money is tendered, is empowered by flatutes 9 & 10 W. III. c. 21. 13 Geo. III. c. 71. and 14 Geo. III. c. 70. to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform: all fuch perfons shall be guilty of felony: and may be prosecuted for the same at any time within three months after the offence committed.

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemesnor at common law, it is enacted by statute 15 & 16 Geo. II. c. 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it fo to be, he shall for the first offence be imprisoned fix months; and find fureties for his good behaviour for fix months more: for the fecond offence, shall be imprisoned two years, and find fureties for two years longer: and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the fame time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find fureties for his good behaviour for two years longer; and for the fecond, be guilty of felony without benefit of clergy. the same statute it is also enacted, that, if any person counterfeits the copper coin, he shall suffer two years imprisonment, and find fureties for two years more. By flatute 11 Geo. III. c. 40. persons counterfeiting copper halfpence or farthings, with their abettors; or buying, felling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of; shall be guilty of single felony. And by a temporary statute (14 Geo. III. c. 42.) if any quantity of money, exceeding the fum of five pounds, being or purporting to be the filver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and profecutor. Thus much for offences relating to the coin, as well misdemesnors as felonies, which I thought it most convenient to consider in one and the same view.

2. Felonies, against the king's council's, are these. First, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's houshold conspires or consederates to kill any lord of this

realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counfellor in the execution of his office, is made felony without benefit of clergy.

- 3. FELONIES in ferving foreign states, which fervice is generally inconfiftent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to ferve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to ferve fuch foreign prince or state, without previously entering into a bond with two fureties, not to be reconciled to the fee of Rome, or enter into any conspiracy against his natural sovereign. And farther, by statute 9 Geo. II. c. 30. enforced by flatute 29 Geo. II. c. 17. if any subject of Great Britain shall enlift himself, or if any person shall procure him to be enlisted, in any foreign fervice, or detain or embark him for that purpose, without licence under the king's fign manual, he shall be guilty of felony without benefit of clergy: but if the perfon, fo enlifted or enticed, shall discover his seducer within fifteen days, fo as he may be apprehended and convicted of the fame, he shall be indemnified. By statute 29 Geo. II. c. 17. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch fervice, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500 %.
- 4. Felony, by imbezzling or destroying the king's armour or warlike stores, is, in the first place, so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's soldiers or mariners; shall, either for gain, or to impede his majesty's service, imbezzle the same

to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after fentence, to transport the offender for feven years. Other inferior imbezzlements and misdemesnors, that full under this denomination, are punished by statutes 9 & 10 W. III. c. 41. 1 Geo. I. c. 25. 9 Geo. I. c. 8. & 17 Geo. II. c. 40. with fine, corporal punishment, and imprisonment. And by statute 12 Geo. III. c. 24. to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arfenals, magazines, dock-yards, rope-yards, or victualling-offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; shall be felony without benefit of clergy.

5. DESERTION from the king's armies in time of war, whether by land or fea, in England or in parts beyond the feas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and defertion) and particularly by statute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the statute 2 & 3 Edw. VI. c. 2. clergy is taken away from such deferters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences with fines, imprisonment, and other penalties,

#### CHAPTER THE EIGHTH.

### OF PRAEMUNIRE.

A THIRD species of offence more immediately affecting the king and his government, though not subject to capital punishment, is that of praemunire: so called from the words of the writ preparatory to the prosecution thereof; "praemunire a facias A. B." cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ b. It took it's original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

It may justly be observed, that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that antient universal observation; that in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is therefore the glory of the church of England, that she inculcates due obedience to lawful authority, and hath been (as her prelates on

a A harbarous word for praemoneri. b Old Nat. Brew. 101. edit. 1534.

a trying occasion once expressed it c) in her principles and practice ever most unquestionably loyal. The clergy of her perfuafion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of fociety and the rights of civil government. As in matters of faith and morality they acknowlege no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their law-giver, and pride themselves in nothing more justly, than in being true members of the church, emphatically by law established. Whereas the notions of ecclefiastical liberty, in those who differ from them, as well in one extreme as the other, (for I here only speak of extremes) are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the fovereign power; and equally aiming at a diffinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of fectaries in England, who murdered their fovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the faints in their stead. But these horrid devastations, the effects of mere madness or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration, Whereas the progress of the papal policy, long actuated by the fleady counfels of fuccessive pontiss, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the jefuits, so lately triumphant over Christendom, but now universally abandoned by even the Roman catholic powers: but the subject of our present

chapter rather leads us to confider the vast strides, which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been deseated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

THE antient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders having driven the professors of christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced fome few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the aera of the Norman conquest: when the then reigning pontiff having favoured duke William in his projected invasion, by bleffing his hoft and confecrating his banners, he took that opportunity also of establishing his spiritual encroachments; and was even permitted fo to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates: prelates, who, being bred abroad in the doctrine and practice of flavery, had contracted a reverence and regard for it, and took a pleasure in rivetting the chains of a free-born people.

THE most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant: in the other it is limited only by absolute will and pleasure, without permitting the inserior to examine the title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish

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clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their turns, were as blindly devoted to the will of the sovereign pontiss, whose decisions they held to be infallible, and his authority coextensive with the christian world. Hence his legates a latere were introduced into every kingdom of Europe, his bulles and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were ensorted by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of christian ordinances, and the benefits of the gosphel of God.

Bur, though the being spiritual head of the church was a thing of great found, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be rivetted upon every method that promifed pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the fouls of the deceased. New-fangled offences were created, and indulgences were fold to the wealthy, for liberty to fin without danger. The canon law took cognizance of crimes, injoined penance pro falute animae, and commuted that penance for money. Non-refidence and pluralities among the clergy, and marriages among the laity related within the feventh degree, were strictly prohibited by canon: but difpenfations were feldom denied to those who could afford to buy them. In fhort, all the wealth of christendom was gradually drained by a thousand channels, into the coffers of the holy see,

THE establishment also of the feodal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church; which began first in Italy, and gradually spread itself to England. The pope became a feodal

feodal lord; and all ordinary patrons were to hold their right of patronage, under this univerfal fuperior. Estates held by feodal tenure, being originally gratuitous donations, were at that time denominated beneficia: their very name as well as constitution was borrowed, and the care of the fouls of a parish thence came to be denominated a benefice. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, fo benefices lapfed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent referved upon a grant; the oath of a canonical obedience was copied from the oath of fealty required from the vafal by his fuperior; and the primer feifins of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vafals, gave a handle to the pope to levy, by the means of his legates a latere, peter-pence and other taxations.

Ar length the holy father went a step beyond any example of either emperor or feodal lord. He referved to himself, by his own apostolical authority d, the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishoprick or abbey: "etiamsi ad illa personae consueverint et debuerint per electionem aut quemvis alium modum assumi." And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feodal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of commendams: and papal provisions were the previous nomination to such benefices, by a kind of anticipation, before they be-

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came actually void: though afterwards indifcriminately applied to any right of patronage exerted or usurped by the pope, In confequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and adverse to the laws and constitution of England. The very nomination to bishopricks, that antient prerogative of the crown, was wrested from king Henry the first, and afterwards from his fucceffor king John; and feemingly indeed conferred on the chapters belonging to each fee: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vefted in the pope. And to fum up this head with a transaction most unparalleled and aftonishing in it's kind, pope Innocent III had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vafal of the holy fee, at the annual rent of a thousand marks.

ANOTHER engine fet on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of four and auftere religion, feparated from the world and it's concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary fanctity, while all their aim was to aggrandize the power and extend the influence of their grand fuperior the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, diforder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century

century after the conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was confecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I MIGHT here have enlarged upon other contrivances which will occur to the recollection of the reader, fet on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourse with the civil magistrate: fuch as the separation of the ecclesiastical court from the temporal; the appointment of it's judges by merely spiritual authority, without any interpolition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the privilegium clericale, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclefiaftical courts e, as well as of purchases in mortmain f, have already been fully discussed in the preceding volumes: and we shall have an opportunity of examining at large the nature of the privilegium clericale in the progress of the present And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was fo deeply laid, and fo indefatigably purfued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engroffed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, (which prevailed not only among the weak and fimple, but even among those of the best natural and acquired endowments) unconnected with their fellow-subjects, and totally indifferent what might befal that posterity to which they bore no endearing relation: -yet it vanished into no-

e See Vol. III. pag. 61.

thing, when the eyes of the people were a little enlightened, and they fet themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowleging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights, and gives every other liberty, that only excepted of despising the laws of the community.

HAVING thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of praemunire, which were framed to encounter this overgrown yet encreasing evil. King Edward I, a wife and magnanimous prince, fet himfelf in earnest to shake off this servile yoke g. He would not suffer his bishops to attend a general council, till they had fworn not to receive the papal benediction. He made light of all papal bulles and processes: attacking Scotland in defiance of one; and feifing the temporalties of his clergy, who under pretence of another refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bulle of excommunication against another, he ordered him to be executed as a traitor, according to the antient law h. And in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to fir Edward Coke i, the foundation of all the fubfequent statutes of praemunire, which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

In the weak reign of Edward the fecond the pope again endeavoured to encroach, but the parliament manfully with-stood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulles of the see of Rome. But Edward the third was of a temper extremely different: and, to remedy these incon-

g Dav. 83, &c. fon. 14. 5 Rep. part 1. fol. 12. 3Aff. 19. h Bro. Abr. tit. Coron. 115. Trea- i 2 Inst. 583.

veniences first by gentle means, he and his nobility wrote an expostulation to the pope: but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, A. D. 1323, had established a law against provisions k) and also the king of France had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provifors , which enact feverally, that the court of Rome shall not present or collate to any bishoprick or living in England; and that whoever disturbs any patron in the prefentation to a living by virtue of a papal provision, fuch provisor shall pay fine and ranfom to the king at his will, and be imprisoned till he renounces fuch provision: and the same punishment is inflicted on fuch as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see refented these proceedings, and pope Urban V. attempted to revive the vafalage and annual rent to which king John had fubjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power m.

In the reign of Richard the second, it was found necesfary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm; in order to compel such, as had crept in, at least to reside on their preferments: and, afterwards, that no alien

k Mod. Un. Hist. xxix. 293. St. 1. c. 1. 38 Edw. III. st. 1. c. 4.

<sup>&</sup>lt;sup>1</sup> Stat. 25 Ed. III. A. 6. 27 Edw. III. & A. 2. c. 1, 2, 3, 4. m Seld. in Flet. 10. 4.

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should be capable to be presented to any ecclesiastical preserment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the ftatute 13 Ric. II. st. 2. c. 2. adds banishment and forseiture of lands and goods: and by c. 3. of the fame statute, any person bringing over any citation or excommunication from beyond fea, on account of the execution of the foregoing statutes of provifors, shall be imprisoned, forfeit his goods and lands, and moreover fuffer pain of life and member.

In the writ for the execution of all these statutes the words praemunire facias, being (as we faid) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of praemunire. And accordingly the next statute I shall mention, which is generally referred to by all fubfequent statutes, is usually called the statute of praemunire. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and affisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of praemunire facias shall be made out against them, as in other cases of provisors.

By the statute 2 Hen. IV. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of praemunire. And this is the last of our antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised against

against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A LEARNED writer, before referred to, is therefore greatly mistaken, when he fays ", that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large fupply, if he would confent that all laws against provisors, and especially the statute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unamimous confent of a provincial fynod, affembled in 1439, 18 Hen. VI. that very fynod which at the same time refused to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by a forced construction were applied to all that fued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdictions: the tenor of the petition being, "that those penal-"ties should be taken to extend only to those that com-"menced anyfuits or procured any writs or public instruments "at Rome, or elsewhere out of England; and that no one " should be prosecuted upon that statute for any fuit in the "fpiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were fo fatisfied with their fuccess, that they granted to the king a whole tenth upon this occasion o.

n Dav. 96.

o Wilk. Concil. Mag. Brit. III. 533.

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And indeed so far was the archbishop, who presided in this fynod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate a latere from the pope; upon the mere principle of it's being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, " he was bound to oppose it by his ligeance, " and also to quit himself to God, and the church of this " land, of which God and the king had made him governor." This was not the language of a prelate addicted to the flavery of the see of Rome; but of one, who was indeed of principles fo very opposite to the papal usurpations, that in the year preceding this fynod, 17 Hen. VI, he refused to confecrate a bishop of Ely, that was nominated by pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI, when he refused to obey the commands of pope Martin V, who had required him to exert his endeavours to repeal the statute of praemunire; ("execrabile illud statutum," as the holy father phrases it) which refusal so far exasperated the court of Rome against him, that at length the pope issued a bulle to fuspend him from his office and authority, which the archbishop disregarded, and appealed to a general council, And fo fensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an embassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome P.

III. passim. and Dr. Duck's life of archbishop Chichele, who was the prelate in vindication of whose memory the and Provisors were made to restrain. author hopes to be excused this digres-

P See Wilk. Concil. Mag. Br. Vol. fion; if indeed it be a difgression, to shew how contrary to the fentiments of fo learned and pious a prelate, even in here spoken of, and the munificent the days of popery, those usurpations founder of All Soul's college in Oxford: were, which the statutes of praemunive

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This then is the original meaning of the offence, which we call praemunire; viz. introducing a foreign power into this land, and creating imperium in imperio, by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of praemunire were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the fee of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to fue to Rome for any licence or dispensation; or to obey any process from thence; are made liable to the pains of praemunire. And, in order to restore to the king in essect the nomination of vacant bishopricks, and yet keep up the established forms, it is enacted by statute 25 Hen. VIII. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of praemunire. Also by statute 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of praemunire; and to defend the pope's jurisdiction in this realm, is a praemunire for the first offence, and high treason for the second. So too, by statute 13 Eliz. c. 2. to import any agnus Dei, crosses, beads, or other superfitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with fuch intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counfellor; they all incur a praemunire. But importing or felling mass-books, or other popish books, is by statute 3 Jac. I. c. 5. §. 25. only liable to a penalty of forty shillings. Lastly, to contribute to the maintenance of a jefuit's college, or any popish seminary whatever, beyond fea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in England, is by statute 27 Eliz. c. 2. made liable to the penalties of praemunire.

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Thus far the penalties of praemunire seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less relation to this original offence, and some no relation at all.

THUS, I. By the statute I & 2 Ph. & Mar. c. 8. to molest the possessions of abbey lands granted by parliament to Henry the eighth, and Edward the fixth, is a praemunire. likewise is the offence of acting as a broker or agent in any usurious contract, where above ten per cent. interest is taken, by statute 13 Eliz. c. 10. 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any fuit for a monopoly, is likewife a praemunire, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the fole making or importation of gunpowder or arms, or to hinder others from importing them, is also a praemunire by two statutes: the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by statute 12 Car. II. c. 24. of purveyance q, and the prerogative of pre-emption, or taking any victual, beafts, or goods for the king's use, at a stated price, without confent of the proprietor, the exertion of any fuch power for the future was declared to incur the penalties of praemunire. 6. To affert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a praemunire by statute 13 Car. II. c. 1. 7. By the habeas corpus act alfo, 31 Car. II. c. 2. it is a praemunire, and incapable of the king's pardon, besides other heavy penalties', to fend any fubject of this realm a prisoner into parts beyond the seas. 8. By the statute I W. & M. st. I. c. 8. persons of eighteen years of age, refufing to take the new oaths of allegiance, as well as fupremacy, upon tender by the proper magistrate, are fubject to the penalties of a praemunire; and by statute 7 &

<sup>9</sup> See Vol. I. pag. 287.

8 W. III. c. 24. ferjeants, counsellors, proctors, attorneys, and all officers of courts, practifing without having taken the oaths of allegiance and fupremacy, and fubscribed the declaration against popery, are guilty of a praemunire, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7. to affert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advifed speaking is a praemunire: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their fixteen reprefentatives in the British parliament, shall presume to treat of any other matter fave only the election, they incur the penalties of a praemunire. 11. The statute 6 Geo. I. c. 18. (enacted in the year after the infamous fouth fea project had beggared half the nation) makes all unwarrantable undertakings by unlawful fubscriptions, then commonly known by the name of bubbles, subject to the penalties of a praemunire. 12. The statute 12 Geo. III. c. 11. subjects to the penalties of the statute of praemunire all fuch as knowingly and wilfully folemnize, affift, or are prefent at, any forbidden marriage of fuch of the descendants of the body of king George II, as are by that act prohibited to contract matrimony without the confent of the crown s.

HAVING thus inquired into the nature and several species of praemunire, it's punishment may be gathered from the foregoing statutes, which are thus shortly summed up by sir Edward Coke : "that, from the conviction, the defendant "shall be out of the king's protection, and his lands and tements, goods and chattels, forfeited to the king: and "that his body shall remain in prison at the king's pleasure;

8 See book I. ch. 4.

t 1 Inft. 129.

" or (as other authorities have it) during life " :" both which amount to the fame thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of habeas corpus. These forfeitures, here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, fir Edward Coke adds, was this offence of praemunire, that a man that was attainted of the same might have been flain by any other man without danger of law: because it was provided by law w, that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary felf-defence. And to obviate fuch favage and mistaken notions x, the statute 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person attainted in a praemunire, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still fuch delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious foever, being fo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may fuffer. And no man, knowing him to be guilty, can with fafety give him comfort, aid, or reliefy.

u 1 Bulft. 199.

w Stat. 25 Edw. III. ft. 5. c. 22.

x Bro. Abr. t. corone, 196.

y 1 Hawk. P. C. 55.

#### CHAPTER THE NINTH.

# OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth species of offences, more immediately against the king and government, are entitled misprissons and contempts.

MISPRISIONS (a term derived from the old French, mespris, a neglect or contempt) are, in the acceptation of our law, generally understood to be all fuch high offences as are under the degree of capital, but nearly bordering thereon: and it is faid, that a misprisson is contained in every treason and felony whatfoever; and that, if the king so please, the offender may be proceeded against for the misprisson only a. And upon the same principle, while the jurisdiction of the starchamber fubfifted, it was held that the king might remit a profecution for treason, and cause the delinquent to be cenfured in that court, merely for a high misdemesnor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Effex's rebellion b. Misprisions are generally divided into two forts; negative, which confift in the concealment of fomething which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

<sup>&</sup>lt;sup>3</sup> Yearb. <sup>2</sup> Ric. III. 10. Staundf. P.C. <sup>b</sup> Hudson of the court of star-cham-<sup>37</sup> Kel. 71. <sup>1</sup> Hal. P. C. <sup>374</sup>. <sup>1</sup> ber. MS. in Mus. Brit. Hawk. P. C. 55, 56.

I. Of the first, or negative kind, is what is called misprision of treason; confisting in the bare knowlege and concealment of treason, without any degree of affent thereto: for any asfent makes the party a principal traitor; as indeed the concealment, which was conftrued aiding and abetting, did at the common law: in like manner as the knowlege of a plot against the state, and not revealing it, was a capital crime at Florence, and other states of Italy c. But it is now enacted by the statute 1 & 2 Ph. & Mar. c. 10, that a bare concealment of treason shall be only held a misprisson. cealment becomes criminal, if the party apprized of the treafon does not, as foon as conveniently may be, reveal it to fome judge of affise or justice of the peace d. But if there be any probable circumstances of assent, as if one goes to a treafonable meeting, knowing before hand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard fuch treasonable conspiracy. meets the fame company again, and hears more of it, but conceals it; this is an implied affent in law, and makes the concealer guilty of actual high treason c.

There is also one positive misprission of treason, created so by act of parliament. The statute 13 Eliz. c. 2. enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprission of treason. For, though the law would not put soreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present: and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprission of treason is loss of the profits of lands during life, forseiture of goods, and imprisonment during life so Which total forseiture of the goods was originally inslicted while

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c Guicciard. Hift. b. 3 & 13.

d 1 Hal. P. C. 3726

e I Hawk. P. C. 56. f I Hal. P. C. 374.

the offence amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter s, that wherever an offence is punished by such total forfeiture it is felony at the common law.

Misprision of felony is also the concealment of a felony which a man knows, but never affented to; for if he affented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute Westm. 1. 3 Edw. I. c. 9. is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "voluntas regis in curia, non in camera"."

THERE is also another species of negative misprisions: namely, the concealing of treasure-trove, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death; but now only by fine and imprisonment i.

II. MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemessions; of which

I. THE first and principal is the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inslicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, sines, or perpetual disability. Hitherto also may be referred the

g See pag. 94.

h 1 Hal. P. C. 375.

j Glanv. 1. 1. c. 2.

i 3 Inft. 133.

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offence of imbezzling the public money, called among the Romans peculatus, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person k. With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisons are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are

2. Contempts against the king's prerogative. As, by refusing to affift him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by perfonal fervice for defence of the realm, against a rebellion or invasion!. Under which class may be ranked the neglecting to join the posse comitatus, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel m. Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of fuch extrinsie power; as, by taking a pension from any foreign prince without the consent of the king n. Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a fummons to attend his privy council, or by letters from the king to a fubject commanding him to return from beyond the feas, (for disobedience to which his lands shall be seised till he does return, and himself afterwards punished) or by his writ of ne exeat regnum, or proclamation, commanding the fubject to flay at home o. Disobedience to any of these commands is a high misprission and contempt: and so, lastly, is disobedience to any act of parliament, where no particular penalty is affigned; for then it is punishable, like the rest of

k Inft. 4. 18. 9.

<sup>1 1</sup> Hawk. P. C. 59:

m Lamb. Eir. 315.

n 3 Inft. 144.

º Sec Vol. I. pag. 266.

these contempts, by fine and imprisonment, at the discretion of the king's courts of justice p,

3. CONTEMPTS and misprisions against the king's person and government, may be by speaking or writing against them, curfing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to leffen him in the efteem of his subjects, may weaken his government, or may raife jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there perfift in the treafons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but fuffer the pillory or other infamous corporal punishment 9: in like manner as, in the antient German empire, fuch persons as endeavoured to sow fedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derifion, by carrying a dog upon their shoulders from one great town to The emperors Otho I. and Frederic Barbaroffa inflicted this punishment on noblemen of the highest rank.

4. Contempts against the king's title, not amounting to treason or praemunire, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen's that it amounts to a praemunire. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, assim, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemessnor, by statute 13 Eliz. c. 1. and punishable with forseiture of goods and chattels. A contempt may also arise from resusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet act-

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P r Hawk, P. C. 60.

r Mod. Un. Hift. xxix, 28. 119.

<sup>9</sup> Ibid. See pag. 91.

ing in a public office, place of trust, or other capacity, for which the faid oaths are required to be taken; viz. those of allegiance, supremacy, and abjuration; which must be taken within fix calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. st. 2. c. 13. are very little, if any thing, short of those of a praemunire: being an incapacity to hold the faid offices, or any other; to profecute any fuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500 l to him or them that will sue for the same. Members on the foundation of any college in the two univerfities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great feal or fign manual. Befides thus taking the oaths for offices, any two justices of the peace may by the same statute fummon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the fame, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter t; which in the end may amount to the alternative of abjuring the realm, or fuffering death as a felon.

5. Contempts against the king's palaces or courts of justice have been always looked upon as high misprisions: and by the antient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death. So too, in the old Gothic constitution, there were many places privileged by law, quibus major reverentia et securitas debetur, ut templa et judicia, quae sancta habebantur,—àrces et aula regis,—denique locus quilibet praesente aut adventante rege. And at present, with us, by the statute

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<sup>\$</sup> See pag. 55.

u Stiernh. de jure Gotb. l. 3. c. 3.

<sup>¥ 3</sup> Inft. 140. LL. Alured. cap. 7, & 34.

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33 Hen. VIII. c. 12. malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.

BUT firiting in the king's superior courts of justice, in Westminster-hall, or at the affises, is made still more penal than even in the king's palace. The reason seems to be, that those courts being antiently held in the king's palace, and before the king himfelf, striking there included the former contempt against the king's palace, and something more; viz. the disturbance of public justice. fon, by the antient common law before the conquest w, striking in the king's courts of justice, or drawing a sword therein, was a capital felony: and our modern law retains fo much of the antient feverity as only to exchange the lofs of life for the lofs of the offending limb. Therefore a stroke or blow in fuch a court of justice, whether blood be drawn or not, or even affaulting a judge fitting in the court, by drawing a weapon, without any blow struck, is punishable with the lofs of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life \*. A rescue also of a prisoner from any of the faid courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life y: being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excufed. For the like reason an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment z.

W LL. Inae. c. 6. LL. Canut. c. 56. LL. Alured. c. 7.

<sup>\*</sup> Staund. P. C. 38. 3 Inft. 140, 141.

y 1 Hawk. P. C. 57.

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Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large sines, imprisonment, and corporal punishment. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like b.

LIKEWISE all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty c: which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forseiture of goods d.

LASTLY, to endeavour to disturde a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments of justice) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And antiently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if selony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision e, and liable to be fined and imprisoned f.

<sup>2</sup> Cro. Car. 503.

b 1 Hawk. P. C. 58.

e 3 Inft. 141, 142.

e See Barr. 212. 27 Aff. pl. 44. §. 4. fol. 138.

f 1 Hawk. P. C. 59.

d Stiernh. de jure Goth. l. 3. c. 3.

CHAPTER THE TENTH.

## OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such crimes and misdemessors as more especially affect the common-wealth, or public polity of the kingdom: which however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the pater-familias of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

THE species of crimes, which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences, and to the punishments inslicted by law for each particular offence; with now and then a sew incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these commentaries.

THE crimes and misdemesnors, that more especially affect the common-wealth, may be divided into five species; viz.

offences against public justice, against the public peace, against public trade, against the public health, and against the public police or oeconomy: of each of which we will take a cursory view in their order.

First then, of offences against public justice: some of which are felonious, whose punishment may extend to death; others only misdemessors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

- 1. IMBEZZLING or vacating records, or falfifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record, or process in the fuperior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury de medietate; half, officers of any of the superior courts, and the other half common jurors. Likewise by statute 21 Jac. I. c. 26. to acknowlege any fine, recovery, deed enrolled, flatute, recognizance, bail, or judgment, in the name of another perfon not privy to the fame, is felony without benefit of clergy. Which law extends only to proceedings in the courts themfelves: but by statute 4 W. & M. c. 4. to personate any other person (as bail) before any judge of affize or other commissioner authorized to take bail in the country, is also felony. For no man's property would be fafe, if records might be fuppressed or falsified, or persons names be falsely usurped in courts, or before their public officers.
- 2. To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute 14 Edw. III. c. 10. that if any gaoler by too great duress of imprisonment makes any prisoner, that he hath in ward, be-

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come an approver or an appellor against his will; that is, as we shall fee hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler. For, as fir Edward Coke observes a, it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by durefs of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for fafe custody.

- 3. A THIRD offence against public justice is obstructing the execution of lawful process. This is at all times an offence of a very high and prefumptuous nature; but more particularly fo, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing fuch arrest becomes thereby particeps criminis; that is, an acceffory in felony, and a principal in high treason b. Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent perfons affembled together to shelter themselves from justice, (especially in London and Southwark) under the pretext of their having been antient palaces of the crown, or the like c: all of which fanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & o Will. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c. 22. which enact, that perfons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, fo that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in difguife, joining in or abetting any riot or tumult on fuch account, or opposing any process, or affaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy.
- 4. An escape of a person arrested upon criminal process, by eluding the viligance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment d. But the officer per-

a 3 Inft. or.

b 1 Hawk. P. C. 121.

c Such as White-Friers, and it's environs; the Savoy; and the Mint in Southwark.

d 2 Hawk. P. C. 122.

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mitting fuch escape, either by negligence or connivance, is much more culpable than the prisoner; the natural defire of liberty pleading strong in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, negligently permit a felon to escape, are also punishable by fine e: but voluntary escapes, by consent and connivance of the officer, are a much more ferious offence: for it is generally agreed that fuch escapes amount to the fame kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. this whether he were actually committed to gaol, or only under a bare arrest f. But the officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemesnor g.

5. Breach of prison by the offender himself, when committed for any cause, was selony at the common law h: or even conspiring to break it i. But this severity is mitigated by the statute de frangentibus prisonam, I Edw. II. which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or selony, remains still selony as at the common law; and to break prison, (whether it be the county gaol, the stocks, or other usual place of security) when lawfully confined upon any other inserior charge, is still punishable as a high misdemessor by fine and imprisonment. For the statute, which ordains that such offence shall be no

e i Hal. P. C. 600. P. C. 134, 5. f 1 Hal. P. C. 590. 2 Hawk. P. C. h 1 Hal. P. C. 607.

<sup>134.</sup> 

g 1 Hol. P. C. 588, 9. 2 Hawk,

longer capital, never meant to exempt it entirely from every degree of punishment.

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the fame offence in the stranger fo rescuing, as it would have been in a gaoler to have voluntarily permitted an escape. rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemesnor, a misdemesnor alfo. But here likewise, as upon voluntary escapes, the principalmust first be attainted or receive judgment before the rescuer can be punished: and for the fame reason; because perhaps in fact it may turn out that there has been no offence committedk. By flatute 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailers of spirituous liquors, or to affault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II. c. 31. to convey to any prisoner in custody for treason or felony any arms, instruments of escape, or disguife, without the knowlege of the gaoler, though no escape be attempted, or any way to affift fuch prisoner to attempt an escape, though no escape be actually made, is felony, and fubjects the offender to transportation for seven years: or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 1001, it is then a mifdemesnor, punishable with fine and imprisonment. And by feveral special statutes, to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the black-act, 9 Geo. I. c. 22. and, being required by order of the privy council to furrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or fuccour him, are felons without benefit of clergy.

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j 2 Hawk. P. C. 128.

k 1 Hal. P. C. 607. Fost. 344.

<sup>1 6</sup> Geo. I. c. 23. (Transportation.) 9 Geo. I. c. 22. (Black-act.) 8 Geo.

II. c. 20. (Destroying turnpikes, &c.)
19 Geo. II. c. 34. (Smuggling.) 25

Geo. II. c. 37. (Murder.) 27 Geo.

II. c. 15. (Black-act.)

<sup>7.</sup> ANOTHER

- 7. Another capital offence against public justice is the returning from transportation, or being feen at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to , transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. 16 Geo. II. c. 15. and 8 Geo. III. c. 15. as is also the affifting them to escape from such as are conveying them to the port of transportation.
  - 8. An eighth is that of taking a reward, under pretence of helping the owner to his stolen goods. This was a contrivance carried to a great length of villany in the beginning of the reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all farther inquiry. famous Jonathan Wild had under him a well-disciplined corps of thieves who brought in all their spoils to him; and he kept a fort of public office for reftoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11. that whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal selon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed.
  - 9. RECEIVING of stolen goods, knowing them to be flolen, is also a high misdemesnor and affront to public justice. We have seen in a former chapter, that this offence, which is only a misdemesnor at common law, by the statutes 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender acceffory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute I Ann. c. 9. and 5 Ann. c. 31. that fuch receivers may full be profecuted for a misdemesnor, and punished by fine and imprisonment, though the principal felon be not before taken

m See ftat. 6 Geo. I.c. 23. §. 9. a See pag. 38. 1

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fo as to be profecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is by statute 29 Geo. II. c. 30. punishable by transportation for fourteen years o. So that now the profecutor has two methods in his choice: either to punish the receivers for the misdemesnor immediately, before the thief is taken P; or to wait till the felon is convicted, and then punish them as acceffories to the felony. But it is provided by the fame statutes, that he shall only make use of one, and not both of these methods of punishment. By the same statute also 29 Geo. II. c. 30. persons having lead, iron, and other metals in their custody, and not giving a fatisfactory account how they came by the fame, are guilty of a misdemesnor and punishable by fine or imprisonment. And by statute 10 Geo. III. c. 48. all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years [A].

10. Of a nature fomewhat fimilar to the two last is the offence of theft-bote, which is where the party robbed not only knows the felon, but also takes his goods again, or other

See also statute 2 Geo. III. c. 28. the Thames.
 for the punishment of receivers of goods stolen by bum boats, &c. in

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<sup>[</sup>A] By statute 21 Geo. III. c. 68. the receiving any stolen copper, brass, beli-metal, or utenfil fixed to any building, or any iron rails or fencing set up in any court or other place, is made transportation for seven years, or three years imprisonment to be kept to hard labour.

By flatute 21 Geo. III. c. 69. the receiving flolen pewter of any kind is subjected to the like penalty, altho, the principal has not been convicted.

By 22 Geo. III. c. 58. the receiving any flolen goods (except lead, iron, copper, brafs, bell-metal and folder) is made a mif-demeanour, punishable by fine and imprisonment, or whipping, as the court shall appoint; which shall exempt the offender from being punished as accessory, altho' the principal be afterwards convicted, and the offence shall appear to be grand larceny, or some greater offence.

amends, upon agreement not to profecute. This is frequently called compounding of felony, and formerly was held to make a man an acceffory; but is now punished only with fine and imprisonment q. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "latroni eum similar milem habuit, qui furtum celare vellet, et occulte sine judice communitaries admittere." By statute 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forseiture of 50 l. each.

- 11. Common barretry is the offence of frequently exciting and stirring up suits and quarrels between his majefty's fubjects, either at law or otherwise's. The punishment for this offence, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practifing for the future '. And indeed it is enacted by statute 12 Geo. I. c. 29. that if any one, who hath been convicted of forgery, perjury, fubornation of perjury, or common barretry, shall practife as an attorney, solicitor, or agent, in any fuit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff: either one not in being at all, or one who is ignorant of the fuit. This offence, if committed in any of the king's fuperior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2. to be punished by fix months imprisonment, and treble damages to the party injured.
- 12. MAINTENANCE is an offence, that bears a near relation to the former; being an officious intermeddling in a fuit

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<sup>1 1</sup> Hawk. P. C. 125.

s 1 Hawk. P. C. 243.

<sup>:</sup> Stiernh. de jure Gate. i. 3. c. 5.

t Ibid. 244.

that no way belongs to one, by maintaining or affifting either party with money or otherwise, to prosecute or defend it a practice that was greatly encouraged by the first introduction of uses. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the crimen salfi to enter into any confederacy, or do any act to support another's lawfuit, by money, witnesses, or patronage. A man may however maintain the suit of his near kinsman, fervant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment; and by the statute 32 Hen. VIII. c. 9. a forseiture of ten pounds.

13. CHAMPERTY, campi-partitio, is a species of maintenance, and punished in the same manner 2: being a bargain with a plaintiff or defendant campum partire, to divide the land or other matter fued for between them, if they prevail at law; whereupon the champertor is to carry on the party's fuit at his own expence 2. Thus champart, in the French law, fignifies a fimilar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our fense of the word, it fignifies the purchasing of a suit, or right of fuing: a practice fo much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the poffession, is not assignable at common law; because no man should purchase any pretence to fue in another's right. These pests of civil society, that are perpetually endeavouring to diffurb the repole of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were feverely animadverted on by the Roman law: " (ui " improbe coeunt in alienam litem, ut quicquid ex condemna-" tione in rem ipfius redactum fuerit inter eos communicaretur, " lege Julia de vi privata tenentur b;" and they were punish. ed by the forfeiture of a third part of their goods, and perpe-

u Hawk. P. C. 249.

w Dr & St. 203.

x Ff. 48. 10. 20.

V 1 Hawk. P. C. 255.

z Ibid. 257.

a Stat. of conspirat. 33 Edw. I.

b Ff. 48. 7. 6.

tual infamy. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9. that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchasor and vendor shall each forseit the value of such land to the king and the prosecutor. These offences relate chiefly to the commencement of civil suits: but

14. The compounding of informations upon penal statutes are an offence of an equivalent nature in criminal causes; and are, besides, an additional misdemesnor against public justice, by contributing to make the laws odious to the people. At once therefore to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5. that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the desendant to excuse him, (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good) he shall forfeit 10 l, shall stand two hours on the pillory, and shall be for ever disabled to sue on any popular of penal statute.

15. A conspiracy also to indict an innocent man of selony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may either have a civil action by writ of conspiracy, (of which we spoke in the preceding book c) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the antient common law to receive what is called the villenous judgment; viz. to lose their liberam legem, whereby they are discredited and disabled as jurors or witnesses; to forseit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their own bodies committed to prison c. But it now is the better opinion, that the villenous judgment is by long

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c See vol III. pag. 126.

e 1 Hawk. P. C. 193.

d Bro. Abr. t. conspiracy. 28.

disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, sine, and pillory. To this head may be referred the offence of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24. at the discretion of the court, with sine, imprisonment, pillory, whipping, or transportation for seven years.

16. THE next offence against public justice is when the fuit is past it's commencement, and come to trial. And that is the crime of wilful and corrupt perjury; which is defined by fir Edward Coke f, to be a crime committed when a lawful oath is administered, in some judicial proceeding, to a perfon who fwears wilfully, abfolutely, and falfely, in a matter material to the iffue or point in question. The law takes no notice of any perjury but fuch as is committed in fome court of justice, having power to administer an oath; or before fome magistrate or proper officer, invested with a similar authority, in fome proceedings relative to a civil fuit or a criminal profecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently in foro conscientiae incur the guilt, and at the fame time evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed malo animo) wilful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before-mentioned. Subornation of perjury is the offence of procuring another to

take fuch a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony 8. But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 l. on the fuborner: and in default of payment, imprisonment for fix months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with fix months imprisonment, perpetual infamy, and a fine of 20%, or to have both ears nailed to the pillory. But the profecution is usually carried on for the offence at common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25. superadds a power, for the court to order the offender to be fent to the house of correction for a term not exceeding feven years, or to be transported for the fame period; and makes it felony without benefit of clergy to return or escape within the time. It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been deftroyed, was also rendered capital, upon a principal of retaliation; as it is in all cases by the laws of France h. And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be confidered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In fuch a constitution therefore it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's fate depends; so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile, and perpetual infamy, are more fuited to the genius of the English law: where the fact is openly discussed between witnesses on both sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where

s 3 Inft. 163.

h Montesq. Sp. L. b. 29. c. 11.

indeed the death of an innocent person has actually been the consequence of fuch wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our antient law in fact inflicted i. But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in all judicial cases be punished with death. For to multiply capital punishments lessens their esfect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with fome other offences, for which only death can be inflicted: and therefore it feems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law, which has adopted the opinion of Cicero k, derived from the law of the twelve tables, " perjurii poena " divina, exitium; humana, dedecus."

17. Bribery is the next species of offence against public juffice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office 1. In the east it is the custom never to petition any superior for justice, not excepting their kings, without a prefent. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many fevere injunctions against bribery, as well for felling a man's vote in the fenate or other public affembly, as for the bartering of common juftice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive fmall prefents, provided they did not in the whole exceed a hundred crowns in the year ": not confidering the infinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wifely, in his ideal republic ,

i Britton. c. 5.

k de Leg. 2. 9.

<sup>1 1</sup> Hawk. P. C. 168.

m Ff. 48. 11. 6.

n de Leg. 1. 12.

orders those who take presents for doing their duty to be punished in the severest manner: And by the laws of Athens he that offered was also profecuted, as well as he that received a bribe o. In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same P. But in judges, especially the superior ones, it hath been always looked upon as fo heinous an offence, that the chief justice Thorp was hanged for it in the reign of Edward III By a statute q 11 Hen. IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's fervice for ever. And fome notable examples have been made in parliament, of perfons in the highest stations, and otherwise very eminent and able, but contaminated with this fordid vice.

- 18. Embracery is an attempt to influence a jury corruptly to one fide by promifes, perfuafions, entreaties, money, entertainments, and the like. The punishment for the perfon embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.
- 19. The false verdict of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned \*.
- of public officers, entrusted with the administration of justice, as sherists, coroners, constables, and the like: which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one. Also the omitting to apprehend persons, offering stoke.

<sup>.</sup> Pott. Antiq. b. 1. c. 23.

P 3 Inft. 147.

<sup>9</sup> Toid. 140.

<sup>1</sup> Hawk. P. C. 259.

<sup>9</sup> See Vol. III. pag. 402, 403.

<sup>: 1</sup> Hawk. P. C. 168.

iron, lead, and other metals to fale, is a misdemesnor, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30.

- which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate) sines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.
- 22. Lastly, extertion is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes a forseiture of the office.

u 1 Hawk. P. C. 170.

### CHAPTER THE ELEVENTH.

## OF OFFENCES AGAINST THE PUBLIC PEACE.

E are next to consider offences against the public peace; the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large a. These offences are either such as are an actual breach of the peace; or constructively so, by tending to make others break it. Both of these species are also either selonious, or not selonious. The selonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

1. THE riotous affembling of twelve persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that flatute was repealed by flatute I Mar. c. I. among the other treasons created fince the 25 Edw. III; though the prohibition was in fubstance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2. c. 12. which made the fame offence a fingle felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the act indemnified the peace officers and their affistants, if they killed any of the mob in endeavouring to suppress such This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established,

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which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute I Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life alfo; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute Geo. I. c. 5. enacts, generally, that if any twelve persons are unlawfully affembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together, for one hour afterwards, fuch contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, fuch oppofers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation ought to have been made, and knowing of fuch hinderance, and not difperfing, are felons without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any person, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.

2. By statute I Hen. VII. c. 7. unlawful hunting in any legal forest, park, or warren, not being the king's property, by night, or with painted faces, was declared to be single selony. But now by the statute 9 Geo. I. c. 22. to appear armed in any inclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high road,

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road, open heath, common, or down, by day or night, with faces blacked or otherwise disguised, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal sish, or to procure by gift or promise of reward any person to join them in such unlawful act, is selony without benefit of clergy. I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the sace blacked or with other disguise, and, being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

- 3. Also by the fame statute 9 Geo. I. c. 22. amended by statute 27 Geo. II. c. 15. knowingly to fend any letter without a name, or with a sictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. V. c. 6.
- 4. To pull down or destroy any lock, suice, or floodgate, erected by authority of parliament on a navigable river, is by statute 1 Geo. II. st. 2. c. 19. made felony, punishable with transportation for seven years [B]. By the statute 8 Geo. II. c. 20. the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 Geo. III. c. 12. maliciously to damage or destroy any banks, fluices or other works on fuch navigable rive, to open the floodgates, or otherwise obstruct the navigation, is again made felony, punishable with transportation for feven years. And by the statute 7 Geo. III. c. 40. (which repeals all former acts relating to turnpikes) malicioully to pull down or otherwife destroy any turnpike-gate, or fence, toll-house, or weighing-engine thereunto belonging, erected

<sup>[</sup>B] This statute of 1 Geo. II. st. 2. c. 19. after several continuances, was suffered to expire in 1748.

erected by authority of parliament, or to refcue any person in custody for the same, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county [c]. The remaining offences against the public peace are merely misdemessnors, and no felonies; as,

5. AFFRAYS (from affraier, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no affray but an affault b. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue c. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find fureties for the peace d. The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually enfued c. Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the

b 1 Hawk. P. C. 134.

d Ibid. 137.

c Ibid. 136.

e Ibid. 138.

<sup>[</sup>c] This statute of 7 Geo. III. c. 40. is repealed by the 13 Geo. III. c. 84. and thereby the offence is made felony, and transportation for seven years, or imprisonment for any time not exceeding three years, at the discretion of the judge (d).

<sup>(</sup>d) [The flatute of 13 Geo. III. c. 84. except fuch parts thereof as have been repealed, varied, or altered, by any subsequent acts of parliament, is extended by statute 21 Geo. III. c. 20. to all acts of parliament which have been made fince the time of the passing of the said act of 13 Geo. III. and which shall hereafter be made for amending and repairing any particular turnpike roads in England.]

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king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to him to whose fervice those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4. that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if alayman, abing ressure (a); and, if a clerk in orders, from the ministration of his office during pleafure. And, if any perfon in fuch church or church-yard proceeds to fmite or lay violent hands upon another, he shall be excommunicated ipfo facto; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. Two perfons may be guilty of an affray: but,

6. RIOTS, routs, and unlawful affemblies, must have three persons at least to constitute them. An unlawful assembly is when three, or more, do affemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it f. A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way: and make some advances towards it 5. A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel 1: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nufance, in a violent and tumultuous manner. The punishment of unlawful affemblies, if to the number of

f 3.Inft. 176.

h 3 Inft. 176.

g Bro. Abr. t. Riot. 4, 5.

<sup>(</sup>a) By statute 27 Geo. III. c. 44. sect. 2. no suit shall be commenced in any ecclesiastical court for striking or brawling in any church of churchyard after the expiration of eight calendar months from the time when such offence shall have been committed.

twelve, we have just now feen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. fame is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes fuperadded i. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff or under-sheriff of the county, may come with the posse comitatus, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which ftatute it hath been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable j. So that our antient law, previous to the modern riot act, feems pretty well to have guarded against any violent breach of the public peace; especially as any riotous affembly on a public or general account, as to redrefs grievances or pull down all inclosures, and also resisting the king's forces if fent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. NEARLY related to this head of riots is the offence of tumultuous petitioning; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1. c. 5. it is enacted, that not more than twenty names shall be figned to any petition to the king or either house of parliament, for any alteration or matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assises or quarter-fessions; and, in London, by the lord mayor, aldermen, and common council k; and that no petition shall

i 1 Hawk. P. C. 159.

others) why the corporation of London

has, fince the restoration, usually taken 1 Hal.P.C.495. 1 Hawk.P.C.161. the lead in petitions to parliament for k This may be one reason (among the alteration of any established law.

be delivered by a company of more than ten persons: on pain in either case of incurring a penalty not exceeding 100 l, and three months imprisonment.

8. An eighth offence against the public peace is that of a forcible entry or detainer; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person diffeifed, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former volume 1. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of fuch violent methods, even of doing themselves justice; and much more if they have no justice in their claim m. So that the entry now allowed by law is a peaceable one; that forbidden is fuch as is carried on and maintained with force, with violence, and unufual weapons. By the statute 5 Ric. II. st. 1. c. 8. all forcible entries are punished with imprifonment and ranfom at the king's will. And by the feveral statutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon fuch conviction may commit the offender to gaol, till he makes fine and ranfom to the king. And moreover the justice or justices have power to fummon a jury, to try the forcible entry or detainer complained of: and, if the fame be found by that jury, then, befides the fine on the offender, the justices shall make restitution by the sheriff of the possesfion, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general fessions. But this provision does not extend to such as endeavour to maintain possession by force, where they them-

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felves, or the ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

- 9. The offence of riding or going armed, with dangerous or unufual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour °.
- 10. Spreading false news, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law p with fine and imprisonment; which is confirmed by statutes Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. and 12 Ric. II. c. 11.
- 11. False and pretended prophecies, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary sears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls q. Such salse and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forseiture of all goods and chattels, and imprisonment during life,

n Holding over by force, where the tenant's title was under a leafe, now expired, is faid to be a forcible detainer. (Cro. Jac. 199.)

o Pott. Antiq. b. 1. c. 26. P 2 Inst. 226. 3 Inst. 198.

<sup>9 &</sup>quot; Habent legibus sanstum, si quis 6. cap. 19. " quid de republica a finitimis rumpre aut

<sup>&</sup>quot;fama acceperit, uti ad magistratum de"fer at, newe cum alio communivet: quod
"saepe bomines temerarios atque imperitos
"falsis rumoribus terreri, et ad facinus im"pelli, et de summis rebus consilium caperer
"cognitum est." Caes. de bell. Gall. lib.
6. cap. 19.

- 12. Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore challenges to fight, either by word or letter, or to be the bearer of such challenge, are punishable by sine and imprisonment, according to the circumstances of the offence. If this challenge arises on account of any money won at gaming, or if any assault or assray happen upon such account, the offender, by statute 9 Ann. c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.
- 13. OF a nature very fimilar to challenges are libels, libelli famoli, which, taken in their largest and most extensive sense, fignify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the fense under which we are now to confider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, figns or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule s. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law f: and therefore the fending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace t. For the same reason it is immaterial with respect to the effence of a libel, whether the matter of it be true or falfe "; fince the provocation, and not the falfity, is the thing to be punished criminally: though, doubtless, the falshood of it may aggravate it's guilt, and enhance it's punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous w; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever

r 1 Hawk. P. C. 135. 138.

<sup>.</sup> Ibid. 193.

f Moor. 813.

<sup>2 2</sup> Brownl. 151. 12 Rep. 35. Hob.

<sup>215.</sup> Poph. 139. 1 Hawk. P. C. 195.

u Moor. 627. 5 Rep. 125. 11 Mod.

w See Vol. III. pag. 125.

ol. 111. pag. 125.

offence it may be against the public peace: and therefore, upon a civil action, the truth of the accufation may be pleaded in bar of the fuit. But, in a criminal profecution, the tendency which all libels have to create animofities, and to difturb the public peace, is the whole that the law confiders. And therefore, in fuch profecutions, the only points to be inquired into are, first, the making or publishing of the book or writing; and, fecondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and fuch corporal punishment as the court in it's discretion shall inslict; regarding the quantity of the offence, and the quality of the offender x. By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became corporal only y. Under the emperor Valentinian z it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the ancient decemviri, or the later emperors.

In this, and the other instances which we have lately confidered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed effential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when pub-

Y 1 Hawk. P. C. 196.

Y Quinetiam lex

Poenaque lata, malo quae nollet carmine quenquam

Describi: vertere modum formidine fustis. Hor. ad Aug. 152.

Z Cod. 9. 36.

Every freeman has an undoubted right to lay what lished. fentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the confequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and fince the revolution a, is to subject all freedom of fentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at prefent) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the prefervation of peace and good order, of government and religion, the only folid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private fentiment is still left; the differninating, or making public, of bad fentiments, destructive of the ends of fociety, is the crime which fociety corrects. A man (fays a fine writer on this subject) may be allowed to keep poisons

The art of printing, foon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of flarchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licenfers. On the demolition of this odious jurifdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licenfing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44. 134.

ii. 88. 230.) iffued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with fome few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute I Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24. but though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.) yet the parliament refifted it fo strongly, that it finally expired, and the press became properly free, in 1694; and has ever fince fo continued.

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in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument here-tofore used for the restraining the just freedom of the press, that it was necessary to prevent the daily abuse of it," will entirely lose it's force, when it is shewn (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.

### CHAPTER THE TWELFTH.

# OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public trade, like those of the preceding classes, are either felonious, or not felonious. Of the first fort are,

- 1. Owling, fo called from it's being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of it's staple manufacture. This was forbidden at common law a, and more particularly by statute 11 Edw. III. c. 1. when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of queen Elizabeth, and fince. The statute 8 Eliz. c. 3. makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy; and confiscation of goods, and three years imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it transportation for feven years, if the penalties be not paid.
- 2. SMUGGLING, or the offence of importing goods without paying the duties imposed thereon by the laws of the cuf-

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toms and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inslict pecuniary penalties and feifure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34. is for this purpose instar omnium; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in difguife to evade them, felony without benefit of clergy: enacting, that if three or more persons shall affemble, with fire-arms or other offensive weapons, to affift in the illegal exportation or importation of goods, or in refcuing the fame after feifure, or in refcuing offenders in custody for fuch offences; or shall pass with fuch goods in disguise; or shall wound, shoot at, or affault any officers of the revenue when in the execution of their duty; fuch perfons shall be felons without the benefit of clergy. As to that branch of the statute, which required any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it feems to be expired; as the subsequent statutes b, which continue the original act to the prefent time, do in terms continue only fo much of the faid act as relates to the punishment of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this politive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot furely be too cautious in inflicting the penalty of death c [D].

3. ANO-

h Stat. 26 Geo. I. c. 32. 32 Geo. II. c See Vol. I. p. 317. Beccar. ch. 33. c. 18. 4 Geo. III. c. 12.

<sup>[</sup>D] By statute 19 Geo. III. c. 69. §. 23. Whereas by an act made in the nineteenth year of his late majesty king Geo. II. which was to continue in force for seven years, and by several subsequent acts hath been continued until Sept. 29, 1785, and from thence to the end of the next session of parliament, persons charged with being guilty of offences in the said act mentioned were required to surrender themselves within a time limited, and that on their neglect or resusal of surrender they were to be deemed

3. ANOTHER offence against public trade is fraudulent bankruptcy, which was fufficiently spoken of in a former volume:

to be convicted and attainted of felony: and whereas doubts have arisen, whether the methods prescribed in the said act, relative to the apprehending and harbouring the offenders, or for caufing them to furrender, were re-enacted and continued by the faid feveral acts; it is enacted and declared, that all the rules, matters and things, relative to the furrender, proclaiming, apprehending, harbouring, and punishing such offenders, are continued and re-enacted by the faid feveral acts continuing the faid recited act. Which rules are to the following effect:

When any person shall be charged with any the said offences. before a justice of the peace, by information on oath, the justice shall certify the same under his hand and feal, and return the information to a fecretary of state, who shall lay the same before the king in council; who may thereon make his order, commanding the offender to furrender in forty days after the first publication thereof in the gazette, to one of the judges of the king's bench or a justice of the peace, who thereon shall commit him to gaol, to answer the charge against him according to due course of law: which order the clerks of the privy council shall cause to be forthwith published in the two successive gazettes, and to be transmitted to the sheriff where the offence was committed; who shall in fourteen days cause the same to be proclaimed between ten in the morning and two in the afternoon, in the market places, on the market days, of two market towns in the same county, near the place where the offence was committed; and a copy of the order shall be affixed on some public place in the said towns: And if such offender shall not surrender pursuant to such order, or escape after surrender, he shall be attainted of felony without benefit of clergy.

And if any person, after the time appointed for surrender, shall knowingly harbour such offender; he shall, on conviction within one year, be guilty of felony, and transported for seven years,

And every person who shall take, or discover so that he may be taken, any person so advertised and not surrendering, and cause him to be brought before a judge of the king's bench, or justice of the peace for London or Middlesex (who shall commit him to Newgate), shall receive 500 in one month after execulume d; I shall therefore here barely mention the several species of fraud, taken notice of by the statute law; viz. the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or imbezzling his effects to the value of 201; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made selony without benefit of clergy. And indeed it is allowed by such as are the most averse to the instiction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the crimen false, ought to be put upon a level with those of forgery and falsifying the coin f. And, even without actual fraud, if the bankrupt can-

tion awarded, from the commissioners of the customs or excise respectively: and if an offender, against whom no such order in council shall have been made, shall himself so discover or apprehend any other against whom an order hath been made; he shall be acquitted of all his own offences for which no prosecution is then commenced, and shall also have his share of the reward: and if any person shall be maimed or grievously wounded in apprehending such offender; he shall receive 50 l, over and above such other reward as he may have as apprehender: and if any person shall be killed in apprehending, his executors or administrators shall receive 100 l.

But this shall not prevent ministers of justice from taking such offender by the ordinary course of law; but if he shall be taken before the expiration of the time limited for his surrender, no surther proceedings shall be had upon the order made in council, but the offender shall be brought to trial by due course of law.

And if any offender, before order for his furrender, shall discover two or more accomplices, so as they be convicted; he shall receive 50 l for each, and be discharged of all offences for which no prosecution shall be then commenced (e).

(e) [The fame clauses are copied in the statute 24 Geo. III. fest. 2. c. 47. relative to the surrender, apprehending, harbouring, and punishing the offenders against that act.]

d See Vol. II. pag. 481, 482.

f Beccar. ch. 34.

c Stat. 5 Geo. II. c. 30.

not make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19. be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 1001, neglects or resules on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only selonious offences against public trade; the residue being mere misdemessors: as,

4. Usury, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume g. We there observed that by statute 37 Hen. VIII. c. q. the rate of interest was fixed at 10 1 per cent per annum, which the statute 13 Eliz. c. 8. confirms; and ordains, that all brokers shall be guilty of a praemunire that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I. c. 17. reduced interest to eight per cent; and, it having been lowered in 1650, during the usurpation, to fix per cent, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to five per cent. Wherefore not only all contracts for taking more are in themfelves totally void, but also the lender shall forfeit treble the money borrowed. Also if any scrivener or broker takes more than five shillings per cent procuration-money, or more than twelve-pence for making a bond, he shall forfeit 20 / with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26. to take more than ten shillings per cent for procuring any money to be advanced on any life-annuity, is made an indictable misdemesnor, and punishable with fine and imprisonment: as is also the offence of procuring or foliciting any infant to grant any life-annuity; or to promife, or otherwise engage, to ratify it when he comes of age.

<sup>8</sup> See Vol. II. pag. 455, &c.

5. CHEATING is another offence, more immediately against public trade: as that cannot be carried on without a punctilious regard to common honesty, and faith between man and Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of breaking the affife of bread, or the rules laid down by law, and particularly by flatutes 31 Geo. II. c. 29. 3 Geo. III. c. 11. and 13 Geo. III. c. 62. for afcertaining it's price in every given quantity, is reducible to this head of cheating: as is likewise in a peculiar manner the offence of felling by falle weights and measures; the standard of which fell under our confideration in a former volume b. The punishment of bakers, breaking the affife, was antiently to stand in the pillory, by statute 51 Hen. III. st. 6. and for brewers (by the fame act) to stand in the tumbrel or dungcart i: which, as we learn from domefday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor. " Malam cerevisiam faciens, in cathedra poneba-" tur flercorisj." But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and fale, the forfeitures imposed by the feveral acts of parliament. Laftly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory k. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the confent of the owner, he shall fuffer fuch punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court hall direct.

See Vol. I. pag. 274.

j Seld, tit. of hon. b. 2. c. 5. §.3. k 1 Hawk. P. C. 188.

- 6. The offence of forestalling the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law, was described by statute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.
- 7. REGRATING was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.
- 8. Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to fell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raife the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to fell it at an unreasonable price, is an offence indictable and finable at the common law. And the general penalty for these three offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III. c. 71.) is, as in other minute misdemesnors, discretionary fine and imprisonment . Among the Romans these offences and other mal-practices to raise the price of provisions, were punished by a pecuniary mulch. " Poena vi-" ginti aureorum statuitur adversus eum, qui contra annonam " fecerit, societatemve coierit quo annona carior fiat "."
- 9. Monopolies are much the fame offence in other branches of trade, that engroffing is in provisions: being a licence or privilege allowed by the king for the fole buying and felling, making, working, or using of any thing what-

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<sup>1 1</sup> Hawk. P. C. 234.

m Cio. Car. 232.

n 1 Hawk P. C. 235.

<sup>9</sup> Ff. 43. 12. 2.

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foever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before P. These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by fir Edward Coke q, in the beginning of the reign of king lames the first: but were in great measure remedied by statute 21 Jac. I. c. 3. which declares such monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, faltpetre, gunpowder, great ordnance, and fhot) and monopolifts are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of praemunire. Combinations also among victuallers or artificers, to raife the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and, in general, by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 101, or twenty days impriforment, with an allowance of only bread and water, for the first offence; 201, or the pillory, for the second; and 40 l for the third, or else the pillory, loss of one ear, and perpetual infamy. In the fame manner, by a constitution of the emperor Zenor, all monopolies and combinations to keep up the price of merchandize, provisions, or workmanthip, were prohibited, upon pain of forfeiture of goods and perpetual banishment.

10. To exercise a trade in any town, without having previously served as an apprentice for seven years, is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader; and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month.

P 1 Hawk. P. C. 231.

<sup>3</sup> Inft. 181.

r Cod. 4. 50. I.

s See Vol. I. pag. 427.

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11. LASTLY, to prevent the destruction of our home manufactures, by transporting and seducing our artists to settle abroad, it is provided by statute 5 Geo. I, c. 27. that such as so entice or seduce them shall be fined 100%, and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers, fo going into foreign countries, and not returning within fix months after warning given them by the British embafiador where they refide, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By flatute 23 Geo. II. c. 13. the feducers incur, for the first offence, a forfeiture of 500/ for each artificer contracted with to be fent abroad, and imprisonment for twelve months; and for the second, 1000/, and are liable to two years imprisonment: and by the same statute, connected with 14 Geo. III. c. 71. if any person exports any tools or utenfils used in the filk, linen, cotton, or woollen manufactures, (excepting woolcards to North America t) he forfeits the same and 2001, and the captain of the ship (having knowlege thereof) 1001: and if any captain of a king's thip, or officer of the customs, knowingly fuffers such exportation, he forfeits 100 /, and his employment; and is for ever made incapable of bearing any public office: and every person collecting fuch tools or utenfils, in order to export the fame, shall on conviction at the assists forfeit such tools and also 200 /. [E]

t Stat. 15 Geo. III. c. 5.

<sup>[</sup>E] By statute 21 Geo. III. c. 37. The said penalties on the captain of the ship and officer of the customs are augmented to 2001: and if any person shall have in his custody, or apply for or procure to be made any such tool or utensil; he shall forseit the same, and 2001, and be imprisoned for twelve months and till the forseiture shall be paid.

And by 22 Geo. III. c. 60. If any person shall contract with, or endeavour to persuade, any artificer concerned in printing callicoes, cottons, muslins, or linens of any fort, or in preparing any tools or utensils for such manufactory, to go out of the kingdom;

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he shall forfeit 500 l, and be imprisoned for twelve months; for a second offence 1000 l, and be imprisoned for two years. And if any person shall export or attempt to export any such tools or utensils, he shall forfeit the same and also 500 l: and any officer of the ship conniving thereat, shall forfeit 500 l; and if it is a king's ship, he shall also forfeit his office and be incapaciated (f).

(f) [And by 25 Geo. III. c. 67, f. 6. If any person shall contract with, entice, persuade, or endeavour to seduce or encourage any artificer or workman concerned or employed, or who shall have worked at, or been employed in the iron or steel manufactures in this kingdom, or in making or preparing any tools or utenfils for such manufactory, to go out of Great-Britain, to any parts beyond the seas (except to Ireland), and shall be convicted thereof, upon indictment or information, in the court of king's bench at Westminster, or by indictment at the assizes, or general gaol-delivery, or quarter-fessions for the county or place wherein such offence shall be committed, or the offender shall live or refide, or by indictment in the court of justiciary, or any of the circuit courts in Scotland, as the case may be; every perfon so convicted shall for every artificer so contracted with, enticed, perfuaded, encouraged or feduced, or attempted fo to be, forfeit and pay the fum of 500 l, and shall be committed to the common gaol for the county, place, or flewartry wherein the offender shall be convicted, there to remain without bail or mainprize, for the space of twelve calendar months, and until fuch forfeiture shall be paid; and 1000 l and two years imprisonment for a subsequent offence.

And by the same act of parliament (sect. 1.) if any person, on any pretence whatsoever, shall export, load, put on board or pack, or cause or procure to be loaden, &c. any ship, which shall be bound to some place beyond the seas (except to Ireland), or shall bring to any quay, wharf, or other place, in order to be laden or put on board any such ship, any tool, &c. in the act specified, he shall not only forfeit such tools; and on complaint upon the oath of one or more credible witness or witnesses before any justice of the peace, it shall be lawful for such justice to issue his warrant to bring the person so complained of before him, or some other justice; and if the offender shall not give a satisfactory account before the justice, he shall be bound, with reasonable sureties, to appear at the next assizes, or the quarter-sessions.

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and in case such person shall refuse or neglect to give such security, then such justice may commit him for trial; and in case any fuch person shall be convicted upon any indictment or information against him, he shall for every such offence forfeit the fum of 2001, and be imprisoned for the space of twelve months, without bail or mainprize, and until fuch forfeiture shall be paid. And by fect. 3. if any captain of a ship shall knowingly permit any tool, &c. by this act prohibited to be exported as aforefaid, to be put on board his ship, he shall for every such offence forfeit the fum of 2001; and if the faid ship shall belong to his majesty, then the captain shall not only forfeit the sum of 2001, but shall also forfeit his employment, and be incapable of holding any office or employment under his majesty, his heirs or suc-But now by statute 26 Geo. III. c. 89. it is lawful to export any tools or utenfils made use of in the iron or steel manufactures of this kingdom, which might have been legally exported before the passing of the act of 25 Geo. III. above-mentioned, except feveral articles in the faid act of 26 Geo. III. specified.

#### CHAPTER THE THIRTEENTH.

### OF OFFENCES AGAINST THE PUB-LIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth species of offences, more especially affecting the commonwealth, are such as are against the public health of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. THE first of these offences is a felony; but, by the blelling of providence for more than a century past, incapable of being committed in this nation. For by statute I Jac. I. c. 31. it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it; he may be inforced, by the watchmen appointed on fuch melancholy occasions, to obey fuch necessary command: and, if any hurt enfue by fuch inforcement, the watchmen are thereby indemnified. And farther, if fuch person so commanded to confine himself goes abroad, and converses in company, if he has no plague fore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious fore upon him, uncured, he then shall be guilty of felony. By the statute 26 Geo. II. c.6. (explained and amended by 29 Geo. II.c. 8. (a)) the method of performing quarantine, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The fame

<sup>(</sup>a) And further enforced and regulated by 28 Geo. III. c. 34.

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penalty also attends persons escaping from the lazarets, or places wherein quarantine is to be personmed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships personning quarantine.

2. A SECOND, but much inferior species, of offence against public health is the selling of unwholesome provisions. To prevent which the statute 51 Hen. III. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome slesh, or slesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, sine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. §. 11. any brewing or adulteration of wine is punished with the forseiture of 1001, if done by the wholesale merchant; and 401 if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health.

V. The last species of offences which especially affect the commonwealth are those against the public police and oeconomy. By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inosfensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprizes all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount, some of them to selony, and others to misdemessors only. Among the former are,

1. The offence of clandestine marriages; for by the statute 26 Geo. II. c. 33. 1. To solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by licence from the archbishop of Canterbury;—and, 2. To solemnize marriage in such church or chapel without due publication of banns, or licence

licence obtained from a proper authority; -do both of them not only render the marriage void, but subject the person folemnizing it to felony, punished by transportation, for fourteen years: as, by three former statutes a, he and his affistants were subject to a pecuniary forfeiture of 100%. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit, fuch entry, or a marriage licence; to cause or procure, or act or assist in such forgery; to utter the fame as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or fubject any person to the penalties of this act; all these offences, knowingly and wilfully committed, fubject the party to the guilt of felony without benefit of clergy.

2. Another felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called bigamy, which properly fignifies being twice married; but is more justly denominated polygamy, or having a plurality of wives at once b. Such fecond marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclefiaftical law of England: and yet the legislature has thought it just to make it felony, by reason of it's being so great a violation of the public oeconomy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many fenfible writers: but

a 6 & 7 W. III. c. 6. 7 & 8 W. III. land, by flatute 4 Edw. I. ft. 3. c. 5. and c. 35. 10 Ann. c. 19. §. 176.

the canonifts, confifted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A. D. 1274, hela under pope Gregory X, were omni privilegio clericali nudati et coercieni fori secularis non was adopted and explained in Eng- clergy. See Dal. 21. Dyer 201.

bigamy thereupon became no uncomb 3 Inft. 88. Bigamy, according to mon counterplea, to the claim of the benefit of clergy. (M. 40 Edw. III. 42. M. 11 Hen. IV. 11. 48. M. 13 Hen. IV. 6. Staunf. P. C. 134.) The cognizance of the plea of bigamy was declared by statute 18 Edw. III. st. 3. c. 2. to belong to the court christian, like that of bastardy. "ut by stat. 1 Edw VI. c. 12. §. 16. bigamy was declared to be no addieri. (6 Decretal. 1. 12.) This ca- longer an impediment to the claim of

in northern countries the very nature of the climate feems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us c, " prope foli barbarorum fingulis uxori-" bus contenti funt." It is therefore punished by the laws both of antient and modern Sweden with deathd. And with us in England it is enacted by statute I Jac. I. c. II. that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the fecond may, for she is indeed no wife at alle: and fo, vice verfa, of a fecond husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony f. 1. Where either party hath been continually abroad for feven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years within this kingdom, and the remaining party hath had no knowlege of the other's being alive within that time. 3. Where there is a divorce (or feparation a mensa et thoro) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any fuch fentence, and the parties loofed a vincule. Or, 5. Where either of the parties was under the age of confent at the time of the first marriage, for in such case the first marriage was voidable by the difagreement of either party, which the fecond marriage very clearly amounts to. But if at the age of confent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act.

3. A THIRD species of selony against the good order and oeconomy of the kingdom, is by idle foldiers and mariners

e de mor. Germ. 18. f 3 Inft. 89, Kel. 27. 1 Hal. P. C.

d Stiernh. dejure Sucon. 1. 3. c. 2. 694.

e 1 Hal. P. C. 693.

and abusing the name of that honourable professions. Such a one not having a testimonial or pass from a justice of the peace, limiting the time of his passage; or exceeding the time limited for fourteen days, unless he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17 made guilty of selony without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book: yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year; unless licenced to depart by his employer, who in such case shall forfeit ten pounds.

4. OUTLANDISH persons calling themselves Egyptians, or gyphes, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering imposters and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have fince fpread themselves all over Europe. Munster h, who is followed and relied upon by Spelman i and other writers, fixes the time of their first appearance to the year 1417; under paffports, real or pretended, from the emperor Sigifmund, king of Hungary. And pope Pius II. (who died A. D. 1464) mentions them in his history as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; and whom he fupposes to have migrated from the country of the Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained fuch a number of idle profelytes, (who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering) that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 k. And the government in England took the alarm much earlier: for in 1530, they are described by statute 22 Hen. VIII. c. 10. as

<sup>8 3</sup> Inft. 85.

h Cosmogr. 1. 3.

i Gloff. 193.

<sup>&</sup>amp; Dufrefne. Gloff. I. 200.

<sup>&</sup>quot; outlandish

outlandish people, calling themselves Egyptians, using no of craft nor feat of merchandize, who have come into this " realm and gone from shire to shire and place to place in of great company, and used great, subtil, and crafty means " to deceive the people; bearing them in hand, that they "by palmestry could tell men's and women's fortunes; and " fo many times by craft and fubtilty have deceived the peoof ple of their money, and also have committed many heinous " felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels: and, upon their trials for any felony which they may have committed, they shall not be entitled to a jury de medietate linguae. And afterwards, it is enacted by statute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. (g) that if any fuch persons shall be imported into this kingdom, the importer shall forfeit 40%. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, (whether natural born fubject or stranger) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herfelf like them, shall remain in the same one month, at one or feveral times; it is felony without benefit of clergy: and fir Matthew Hale informs us, that at one Suffolk affifes no lefs than thirteen gypfies were executed upon thefe flatutes a few years before the reftoration. But, to the honour of our national humanity, there are no inflances more modern than this, of carrying these laws into practice.

of death. Common nusances are a species of offences against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. The nature of common nusances, and their distinction from private nusances, were explained in the pre-

<sup>(</sup>g) [This act is repealed by flatute 23 Geo. III. c. 51. vid. ante page 4.]

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ceding volume"; when we confidered more particularly the nature of the private fort, as a civil injury to individuals. I shall here only remind the student, that common nusances are fuch inconvenient or troublesome offences, as annoy the whole community in general, and not merely fome particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply fuits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are, I. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obftructing, or fuch individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distreined to repair and amend them, and in some cases fined. And a presentment thereof by a judge of affise, &c. or a justice of the peace, shall be in all respects equivalent to an indictment. Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or fuch like public things, it is properly called a purprefture P. 2. All those kinds of nusances, (such as offensive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public profecution, and subject to fine according to the quantity of the misdemesnor: and particularly the keeping of hogs in any city or market town is indictable as a public nusance 9. 3. All disorderly inns or ale-houses, basedyhouses, gaming-houses, slage-plays unlicenced, booths and stages for rope-dancers, mountebanks, and the like, are public nufances, and may upon indictment be suppressed and fined. Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, fuppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very

n Vol. III. pag. 216.

o Stat. 7 Geo. III. c. 42.

P Co. Litt. 277. from the French

pourpris, an inclosure.

<sup>9</sup> Salk. 460.

r 1 Hawk. P. C. 198. 225.

fufficient cause: for thus to frustrate the end of their inflitution is held to be diforderly behaviour f. Thus too the hofpitable laws of Norway punish, in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price s. 4. By statute 10 & 11 W. III. c. 17. all lotteries are declared to be public nufances, and all grants, patents, or licences for the same to be contrary to law. But, as state-lotteries have, for many years past, been found a ready mode for raising the supply, an act was made 19 Geo. III. c. 21. to licence and regulate the keepers of fuch lottery-offices, 5. The making and felling of fire-works and fquibs, or throwing them about in any street, is, on account of the danger that may enfue to any thatched or timber buildings, declared to be a common nusance, by flatute 9 & 10 W. III. c. 7. and therefore is punishable by fine. And to this head we may refer (though not declared a common nufance) the making, keeping, or carriage, of too large a quantity of gunpowder at one time, or in one place or vehicle; which is prohibited by statute 12 Geo. III. c. 61. under heavy penalties and forfeiture. 6. Eaves-droppers, or fuch as liften under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nusance and presentable at the court-leet t: or are indictable at the fessions, and punishable by fine and finding fureties for their good behaviour i. 7. Lastly, a common scold, communis rinatrix, (for our law-latin confines it to the feminine gender) is a public nufance to her neighbourhood. For which offence she may be indicted v; and, if convicted, shall w be fentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which in the Saxon language is faid to fignify the fcolding stool; though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment x.

f 1 Hawk. P. C. 225.

s Stiernh. de jure Sucon. 1. 2. c. 9.

t Kitch. of courts. 20.

u 1bid. 1 Hawk. P. C. 132.

v 6 Mod. 213.

w 1 Hawk. P. C. 198. 200.

x 3 Inft. 219.

<sup>6.</sup> IDLENESS

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6. IDLENESS in any person whatsoever is also a high offence against the public oeconomy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, fomebody must suffer cold or hunger: the produce of the lands not being more than fufficient, with culture, to maintain the inhabitants: and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he fpent his time; the intention of which was y, that the Athenians, knowing they were to give an account of their occupations, should follow only fuch as were laudable, and that there might be no room left for fuch as lived by unlawful arts. The civil law expelled all flurdy vagrants from the city 2: and, in our own law, all idle persons or vagabonds, whom our antient statutes describe to be "fuch as wake on the night, and sleep on the " day, and haunt customable taverns, and ale-houses, and " routs about; and no man wot from whence they come, ne " whether they go;" or fuch as are more particularly described by statute 17 Geo. II. c. 5. and divided into three classes, idle and diforderly persons, rogues and vagabonds, and incorrigible rogues; -all these are offenders against the good order, and blemishes in the government, of any kingdom. They are therefore all punished, by the statute last mentioned; that is to fay, idle and diforderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding fix months; and incorrigible rogues with the like discipline and confinement, not exceeding two years: the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be transported for feven years. Perfons harbouring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby: in the same manner as, by our antient

y Valer. Maxim. 1. 2. c. 6.

laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offence that such his inmate might commit <sup>a</sup> (h).

7. Under the head of public oeconomy may also be properly ranked all sumptuary laws against luxury, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down b, that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil; and as such cognizable by public laws. And indeed our legislators have several times changed their sentiments as to this point; for formerly there were a

a LL. Edw. c. 27. Bracton. l. 3. tr. 2. b Sp. L. b. 7. c. 2 & 4. c. 10. §. 2.

<sup>(</sup>b) [By the statute 23 Geo. III. c. 88. reciting, Whereas divers ill-disposed persons are frequently apprehended, having upon them implements for house-breaking, or offensive weapons, or are found in or upon houses, warehouses, stables, or outhouses, areas of houses, coach-houses, inclosed yards or gardens belonging to houses, with intent to commit felonies; and although their evil purposes are thereby manifested, the power of his majesty's justices of the peace to demand of them sureties for their good behaviour hath not been of sufficient effect to prevent them from carrying their evil purposes into execution; it is enacted, that if any person shall be apprehended, having upon him or her any picklock-key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or out-house; or shall have upon him any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to affault any person, or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard or garden or area belonging to any house, with an intent to steal any goods or chattels, every fuch person shall be deemed a rogue and vagabond, within the intent and meaning of the statute made in the seventeenth year of his late majefty king George the Hd.] multitude

multitude of penal laws existing, to restrain excess in appares, chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one antient statute unrepealed, 10 Edw. III. st. 3. which ordains that no man shall be served, at dinner or supper, with more than two courses; except upon some great holidays there specified, in which he may be served with three.

8. NEXT to that of luxury, naturally follows the offence of gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at prefent fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class; and, among perfons of a superior rank, it hath frequently been attended with the fudden ruin and defolation of antient and opulent families, an abandoned profitution of every principle of honour and virtue, and too often hath ended in felf-murder. To restrain this pernicious vice, among the inferior fort of people, the statute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified d, unless in the time of christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the mafter of any public house wherein fervants are permitted to game, as upon the fervants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a facri-

d Logetting in the fields, flide-thrift and coyting.

c 3 Inft. 199. or shove-great, cloyish-cayles, balf-bowl,

fice, and which we feem to have inherited from our ancestors the antient Germans; whom Tacitus e describes to have been bewitched with the spirit of play to a most exorbitant degree. "They addict themselves, says he, to dice (which is wonderful) when fober, and as a ferious employment; with " fuch a mad defire of winning or lofing, that, when stript of every thing elfe, they will stake at last their liberty " and their very felves. The lofer goes into a voluntary fla-" very, and, though younger and stronger than his antago-" nift, fuffers himself to be bound and fold. And this per-" feverance in fo bad a cause they call the point of honour: " ea est in re prava pervicacia, ipsi fidem vocant." One would almost, be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with fo frantic a spirit, laws will be of little avail: because the same false fense of honour, that prompts a man to facrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may confider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or, if unfuccefsful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II. c. 7. if any person by playing or betting shall lose more than 100 l at one time, he shall not be compellable to pay the fame; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute o Ann. c. 14. enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void; that all mortgages and incumbrances of lands, made upon the fame consideration, shall be and enure to the use of the heir of the mortgagor: that, if any person at any time or fitting loses 10! at play, he may fue the winner, and recover it back by action of debt at law; and, in cafe the lofer does not, any other person may sue the winner for treble the sum so lost; and the plaintiff may by bill in equity examine the defendant himself upon oath: and that in any of these suits no privilege of parliament shall be allowed. The statute farther enacts, that if any person by cheating at play shall win any money or vahuable thing, or shall at any one time or fitting win more than 10%, he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and (in eafe of cheating) shall be deemed infamous, and fuffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of king George II. f, all private lotteries by tickets, cards, or dice, (and particularly the games of faro, baffet, ace of hearts, hazard, paffage, rolly polly, and all other games with dice, except back-gammon) are prohibited under a penalty of 2001 for him that shall erect fuch lotteries, and 50 / a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of fales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes s under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19. to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50 l value shall be run, upon penalty of 2001, to be paid by the owner of each horse running, and 100 l by such as advertise the plate. By statute 18 Geo. II. c. 34. the statute 9 Ann. is farther enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or lofing at play or by betting at any one time 10% or 20 l within twenty-four hours, he shall be fined five times the fum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not

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f 12 Geo. II. c. 28. 13 Geo. II. c. 6. § 56. 10 Ann. c. 26. § 109. 18 Geo. II. c. 34. 8 Geo. I. c. 2. § 36, 37. 9 Geo. I. c. 19. 8 D & 11 W. III. c. 17. 9 Ann. § 4, 5. 6 Geo. II. c. 35. § 29, 30.

fo deficient, as ourselves and our magistrates in putting those laws in execution.

Q. LASTLY, there is another offence, constituted by a variety of acts of parliament; which are fo numerous and fo confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England feem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: affociations having been formed all over the kingdom to prevent it's descructive progress. I mean the offence of destroying such beasts and fowls, as are ranked under the denomination of game: which, we may remember, was formerly observed h, (upon the old principles of the forest law) to be a trespass and offence in all persons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offence, unless they be people of fuch rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's licence expressed by the grant of a franchife, are guilty of the first original offence, of encroaching on the royal prerogative. And those indigent perfons who do fo, without having fuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations also, created by the flatutes for preferving the game: which aggravations are fo feverely punished, and those punishments so implacably inflicted, that the offence against the king is feldom thought of, provided the miferable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the prefent head, because the only rational footing, upon which we can confider it as a crime, is, that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings:

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which is an offence against the public police and oeconomy of the commonwealth.

THE statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarkedi, that in one statute only, 5 Ann. c. 14. there is false grammar in no fewer than fix places, befides other miftakes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at prefent inquire. It is in general fufficient to observe, that the qualifications for killing game, as they are usually called, or more properly the exemptions from the penalties inflicted by the statute law, are, I. The having a freehold estate of 100 l per annum; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the thire (i): 2. A leasehold for ninety-nine years of 1501 per annum: 3. Being the fon and heir apparent of an esquire (a very loofe and vague description) or person of superior degree: 4. Being the owner, or keeper, of a forest, park, chase, or warren (k). For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game, or have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on fundays or on Christmas day, there are various penalties affigned, corporal and pecuniary, by different statutes k; on any of which, but only on one at a time, the justices may convict in a fummary way, or (in most of them) profecutions may be carried on at the affifes. And, laftly, by statute 28 Geo. II. c. 12. no person, however qualified to kill, may make merchandize of this valuable privilege, by selling or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

(i) [If the estate be a freehold for term of life only, it must be of the clear yearly value of 150 l. Lowndes v. Lewis, East. term, 22 Geo. III. K. B.]

i Burn's Justice, tit. Game. §. 3. k Ibid. eod. tit.

<sup>(</sup>k) [And by statute 25 Geo. III. c. 50. no person can destroy the game until he has delivered an account, in writing, of his name and place of abode to the clerk of the peace of the county where he lives, and taken out a certificate, for which he shall pay annually a stamp duty of 21.25.]

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## CHAPTER THE FOURTEENTH.

## OF HOMICIDE.

In the ten preceding chapters we have confidered, first, fuch crimes and misdemessors as are more immediately injurious to God and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people: fourthly, such as more directly infringe the rights of the public or commonwealth, taken in it's collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure individuals or private subjects.

Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; I. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them all most always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is,

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that, belides the private fatisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the jus gladii, or executory power of the law, entirely refides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents; first, for the private wrong to the party injured; fecondly, for the offence against the king by disobedience to the laws; and thirdly, for the crime against the public by their evil example a. Of which we may trace the groundwork, in what Tacitus tells us of his Germans b; that, whenever offenders were fined, " pars " mulctae regi, vel civitati, pars ipsi qui vindicatur vel propin-" quis ejus, exfolvitur."

THESE crimes and mistemesnors against private subjects are principally of three kinds; against their persons, their habitations, and their property.

Or crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be the offence of homicide or destroying the life of man, in it's several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it,

Now homicide, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the

<sup>3</sup> Stiernhook. 1. 1. c.5.

b de mor. Germ. c. 12.

third is the highest crime against the law of nature that man is capable of committing.

## I. JUSTIFIABLE homicide is of divers kinds.

1. Such as is owing to some unavoidable necessity, without any will, intention, or defire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traiter, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder c. For as Bracton d very juftly obferves, " iftud homicidium fi fit ex livore, vel delectatione effurdendi humanum sanguinem, licet juste occidatur ifte, tamen occi cifor peccat mortaliter, propter intentionem corruptam." And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. And upon this account fir Matthew Hale himfelf, though he accepted the place of a judge of the common pleas under Cromwell's government, (fince it is necessary to decide the disputes of civil property in the worst of times) yet declined to fit on the crown fide at the affifes, and try prisoners; having very ftrong objections to the legality of the usurper's commission : a distinction perhaps rather too refined; fince the punishment of crimes is at least as necessary to fociety, as maintaining the boundaries of property. Also fuch judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it, which requisition it is, that justifies the homicide. If another

c 1 Hal. P. C. 497.

d fol. 120.

e 1 Hawk. P. C. 70. 1 Hal. P. C. 4974

f Burnet in his life.

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person doth it of his own head, it is held to be murder 8: even though it be the judge himself. It must farther be executed, fervato juris ordine; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder i: for he is merely minifterial, and therefore only justified when he acts under the authority and compulsion of the law; but, if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and besides, this licence might occasion a very gross abuse of his power. The king indeed may remit part of a fentence; as, in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the cafe of felony, where the judgment is to be hanged, the king (it hath been faid) cannot legally order even a peer to be beheaded k. But this doctrine will be more fully confidered in a fubfequent chapter.

AGAIN: in fome cases homicide is justifiable, rather by the permission, than by the absolute command, of the law: either for the advancement of public justice, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the prevention of some atrocious crime, which cannot otherwise be avoided.

2. Homicides, committed for the advancement of public justice, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with selony, and is resisted; and, in the endeavour to take him, kills him. This is similar to the old Gothic constitutions, which (Stiernhook informs us n) "furem, si aliter capi non posset, occidere permit-

<sup>8 1</sup> Hal. P. C. 501. 1 Hawk. P. C. k 3 1 70.

h Dalt. Just. c. 150.

i Finch. L. 31. 3 Inft. 52. 1 Hal. P. C. 501.

k 3 Inft. 52. 212.

<sup>1 1</sup> Hal. P. C. 494. 1 Hawk. P. C.

m 1 Hal. P. C. 494.

n de jure Geth, l. 3. c. 5.

" tunt." 3. In case of a riot, or rebellious affembly, the officers endeayouring to disperse the mob are justifiable in killing them, both at common law o, and by the riot act, I Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to gaol, affault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the fake of preventing an escape P. 5. If trefpaffers in forests, parks, chases, or warrens, will not furrender themselves to the keepers, they may be flain; by virtue of the flatute 21 Edw. I. ft. 2. de malefactoribus in parcis, and 3 & 4 W. & M. c. 10. But, in all these cases, there must be an apparent necessity on the officer's side; viz. that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, fuch homicide was justifiable, and was imputed to the just judgment of God, who was thereby prefumed to have decided in favour of the truth 9.

3. In the next place, such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house in the night time, (which extends also to an attempt to burn it;) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no thest with death, makes homicide only justifiable, in case of nocturnal house-breaking; " if a thief be found breaking up, and he be smitten

o 1 Hal. P. C. 495. 1 Hawk. P. C. Puff. L. of N. l. 2. c. 5. 361: 56. 155.

P 1 Hal. P. C. 496.

<sup>1</sup> Hal. P. C. 488.

<sup>9 1</sup> Hawk. P. C. 715

" that he die, no blood shall be shed for him: but if the fun so be rifen upon him, there shall blood be shed for him; for "he should have made full restitution"." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact w: and, by the Roman law of the twelve tables, a thief might be flain by night with impunity; or even by day, if he armed himself with any dangerous weapon x: which amounts very nearly to the fame as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed indefence of the chaftity either of one's felf or relations y: and so also, according to Selden 2, stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish hera: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by confent, for the one is forcible and felonious. but not the other b. And I make no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally refifted by the death of the unnatural aggreffor. For the one uniform principle that runs through our own, and all other laws, feems to be this; that where a crime, in itfelf capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds, "that all "manner of force without right upon a man's person, puts "him in a state of war with the aggressor; and, of conse-"quence, that, being in fuch a state of war, he may law-"fully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized pature, yet the law of England, like that of every other

u Exod. xxii. 2.

W Potter. Antiq. b. 1. c. 24.

x. Cic. pro Milone. 3. Ff. 9. 2. 4. y " Divus Hadrianus rescripsit, eum

<sup>&</sup>quot; qui fluprum sibi vel suis inferentem occi-

<sup>&</sup>quot; dit, dimittendum." (Ff. 48. 8. 1.)

z de legib. Hebræor. 1. 4. c. 3. a Bac. Elem. 34. 1 Hawk. P. C. 71.

b 1 Hal. P. C. 485, 486.

c Eff. on gov. p. 2. c. 5.

well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.

In these instances of justifiable homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in excusable homicide; the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of selony, though in strictness it judges it deserving of some little degree of punishment.

II. EXCUSABLE homicide is of two forts; either per infortunium, by misadventure; or fe defendendo, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or, where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man d: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manssaughter at least, and in some cases (according to the circumstances) murdere; for the act of immoderate correction is unlawful.

d 1 Hawk. P. C. 73, 74.

e 1 Hal. P. C. 473, 474.

Thus by an edict of the emperor Constantine , when the rigor of the Roman law with regard to flaves began to relax and foften, a mafter was allowed to chaftife his flave with rods and imprisonment, and, if death accidentally enfued. he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet groffer manner "immoderate fuo jure utatur, tune " reus homicidii sit."

Bur, to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and fo are boxing and fwordplaying, the fucceeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command, or permit fuch diversion, it is faid to be only misadventure; for then the act is lawful g. In like manner as, by the laws both of Athens and Rome, he who killed another in the pancratium, or public games, authorized or permitted by the state, was not held to be guilty of homicideh. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence i. And in general, if death enfues in confequence of an idle, dangerous, and unlawful fport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cafes, the flayer is guilty of manflaughter, and not mifadventure only, for these are unlawful acts k,

2. Homicide in self-defence, or se defendendo, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only

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f Cod. 1. 9. t. 14.

i Hawk, P. C. 73.

<sup># 1</sup> Hal. P.C. 473. 1 Hawk. P. C. 74. k Ibid. 74. 1 Hal. P. C. 472. Fost.

h Plato. de LL. lib. 7. Ff. 9. 2. 7. 261.

a matter of excuse, but of justification. But the self-defence. which we are now speaking of, is that whereby a man may protect himself from an affault, or the like, in the course of a fudden brawl or quarrel, by killing him who affaults him. And this is what the law expresses by the word chance-medley, or (as some rather choose to write it) chand-medley; the former of which in it's etymology fignifies a cafual affray, the latter an affray in the beat of blood or passion; both of them of pretty much the same import; but the former is in common fpeech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5. and our antient books 1, that it is properly applied to fuch killing as happens in felf-defence upon a fudden rencounter m. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in fudden and violent cases; when certain and immediate fuffering would be the confequence of waiting for the affiftance of the law. Wherefore, to excuse homicide by the plea of felf-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his affailant.

It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper, legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to sight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires, that the person, who kills another in his own desence, should have retreated as far as he

<sup>1</sup> Staunf. P. C. 16.

n 3 Inft. 55.

m 3 Inft. 55. 57. Foft. 275, 276.

o Foft. 277.

conveniently or fafely can, to avoid the violence of the affault. before he turns upon his affailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations. to flee from an enemy; yet between two fellow-subjects the law countenances no fuch point of honour: because the king and his courts are the vindices injuriarum, and will give to the party wronged all the fatisfaction he deferves P. In this the civil law also agrees with ours, or perhaps goes rather farther; " qui cum aliter tueri se non possunt, damni culpam " dederint, innoxii funt 9." The party affaulted must therefore flee as far as he conveniently can, either by reason of fome wall, ditch, or other impediment; or as far as the fierceness of the affault will permit him': for it may be fo fierce as not to allow him to yield a ftep, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his affailant inftantly. And this is the doctrine of universal justices, as well as of the municipal law.

AND, as the manner of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the assay is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to sight a duel, and A gives the sirst onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and bona side slees; and, being driven to the wall, turns again upon B and kills him; this may be set defendendo according to some of our writers.

P 1 Hal. P. C. 481. 483.

<sup>9</sup> Ff. 9. 2. 45.

<sup>7 1</sup> Hal. P. C. 483.

s Puff. b. 2. c. 5. §. 13.

t 1 Hal. P. C. 479.

a 1 Hal. P. C. 482.

though others whave thought this opinion too favourable; inafmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself x.

There is one species of homicide se defendendo, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preserable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon, where two persons, being shipwrecked, and getting on the same plank, but sinding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless. And as to the necessity which excuses a man who

w 1 Hawk. P. C. 75.

y Elem. c. 5. See alfo i Hawk. P. C. 73. 2 1 Hawk. P. C. 72.

kills another fe defendendo, lord Bacon a entitles it necessitas culpabilis, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or affault arose from some unknown wrong, or fome provocation, either in word or deed: and fince in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the furvivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my fide. The law befides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who flays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

Nor is the law of England fingular in this respect. Even the flaughter of enemies required a folemn purgation among the Jews; which implies that the death of a man, however it happens, will leave fome stain behind it. And the mosaical law b appointed certain cities of refuge for him " who "killed his neighbour unawares: as if a man goeth into " the wood with his neighbour to hew wood, and his hand " fetcheth a stroke with the ax to cut down a tree, and the " head flippeth from the helve, and lighteth upon his neigh-"bour that he die, he shall flee unto one of these cities " and live." But it feems he was not held wholly blamelefs, any more than in the English law; fince the avenger of blood might flayhim before he reached his afylum, or if he afterwards ftirred out of it till the death of the high prieft. In the imperial law likewise cafual homicide was excused, by the indulgence of the emperor figned with his own fign manual, " adnotatione principis:" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks d homicide by misfortune was expiated by voluntary

a Elem. c. 5. c Cod. 9. 16. 5. v Numb. c. 35. and Deut. c. 19. d Plato. de Leg. lib. 9.

banishment for a year. In Saxony a fine is paid to the kind dred of the slain; which also, among the Western Goths, was title inferior to that of voluntary homicide f: and in France: no person is ever absolved in cases of this nature, without a largest to the poor, and the charge of certain masses for the soul of the party killed.

THE penalty inflicted by our laws is faid by fir Edward Coke to have been antiently no less than death ; which however is with reason denied by later and more accurate writers i. It feems rather to have confifted in a forfeiture. fome fay of all the goods and chattels, others of only part of them, by way of fine or weregild's: which was probably difposed of, as in France, in pios usus, according to the humane fuperstition of the times, for the benefit of his foul, who was thus fuddenly fent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forseiture) growing more severe than was intended, in proportion as perfonal property has become more confiderable, the delinquent has now, and has had as early as our records will reach 1, a pardon and writ of restitution of his goods as a matter of course and right, only paying for fuing out the fame m. And indeed, to prevent this expense, in cases where the death has notoriously happened by mifadventure or in felf-defence, the judges will usually permit (if not direct) a general verdict of acquittal".

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or fex, without justification or excuse. This may be done either by killing one's felf, or another man.

e To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third iliad, that when a child, he was obliged to flee his country for casually killing his playfellow; "names in the standard."

f Stiernh. de jure Gab. 1. 3. c. 4.

& De Mornay, on the digeft.

h 2 Inft. 148. 315.

i 1 Hal. P. C. 425. 1 Hawk. P. C.

75. Foft. 282, Gc.

k Foit. 287.

1 Foft. 283.

m 2 Hawk. P. C. 381.

A Foft. 288.

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SELF-MURDER, the pretended heroifin, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it feems to be countenanced by the civil law , yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed P. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the fuicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's felf. And this admits of acceffories before the fact, as well as other felonies; for if one perfuades another to kill himfelf, and he does fo, the adviser is guilty of murder q. A felo de le therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the confequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's fword: or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroner's juries are apt to carry it, viz. that the very act of fuicide is an evidence of infanity; as if every man, who acts contrary to reason, had no reason at all: for the fame argument would prove every other criminal non compos, as well as the felf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of difcerning right from wrong; which is necessary, as was observed in a former chapter, to

o " Si quis impatientia deleris, aut

<sup>9</sup> Keilw. 136. 1 1 Hawk. P. C. 68, 1 Hal. P. C.

<sup>&</sup>quot; taedio vitae, aut morbo, aut furore, " aut pudore, mori maluit, non animad- 413.

<sup>&</sup>quot; vertatur in eum." Ff. 49. 16. 6. i See pag. 24.

<sup>?</sup> Pott. Antiq. b. i. c. 26.

form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a felo de se as much as another man.

Bur now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king, prior to the wife's title by furvivorship, which could not accrue till the inftant of her husband's death t. And though it must be owned that the letter of the law herein borders a little upon feverity, yet it is some alleviation that the power of mitigation is left in the breaft of the fovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy.

THE other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into manslaughter and murder. The difference between which may be partly collected from what has been incidently mentioned in the preceding articles, and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart.

s 1 Hal. P. C. 412.

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1. Manslaughter is therefore thus defined ", the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions "homicidia vulgaria; quae aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiae calore et impetu "." And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first, or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occafion go out and fight in a field; for this is one continued act of passion x: and the law pays that regard to human frailty, as not to put a hafty and deliberate act upon the fame footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nofe, or other great indignity, and immediately kills the aggreffor, though this is not excufable fe defendendo, fince there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manflaughter y. But in this, and in every other case of homicide, upon provocation, if there be a fufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder 2. So if a man takes another in the act of adultery with his wife, and kills him directly upon the fpot; though this was allowed by the laws of Solon a, as likewise by the Roman civil law, (if the adulterer was found in the husband's own house b) and also among the antient Goths c; yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape,

<sup>&</sup>quot; 1 Hal. P. C. 466.

w Stiern. de jure Goth. 1. 3. c. 4.

<sup>\* 1</sup> Hawk. P. C. 82.

y Kelyng. 135.

z Foft. 296.

a Plutarch. in vit. Solon.

b Ff. 48. 5. 24.

c Stiernh. de jure Goth. 1. 3. c. 2.

but it is manslaughter. It is however the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inslicted, because there could not be a greater provocation. Manslaughter therefore on a sudden provocation differs from excusable homicide se defendends in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

THE fecond branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful As if two persons play at fword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any perfonal mifchieff. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumfpection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either mifadventure, manflaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengets are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning s; and murder, if he knows of their passing; and gives no warning at all, for then it is malice against all mankind h. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter; according to the nature of the act which occasioned it. If it be in prosecution of a felonious

c. 31. if any waterman between Gravefend and Windfor receives into his boat or barge a greater number of perfons than the act allows, and any paffenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.

<sup>4</sup> Hal. P. C. 486.

e Sir T. Raym. 211,

f 3 Inft. 56.

<sup>£</sup> Kel. 40.

h 3 Inft. 57.

j Our flatute law has severely animalverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II.

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intent, or in it's consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter i.

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally stabbing another, though done upon fudden provocation. For by statute I Jac. I. c. 8. when one throfts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, fo that he dies thereof within fix months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accesfion of James the first k; and, being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of folid and fubstantial justice, it cannot be faid that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the stature fofavourably in behalf of the fubject, and fo strictly when against him, that the offence of stabbing now stands almost upon the fame footing, as it did at the common law 1. Thus, (not to repeat the cases before-mentioned, of stabbing an adulteress, &c. which are barely manslaughter, as at common law) in the construction of this statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it feems to be the better opinion, that this is not within the statute". Also it hath been resolved, that the killing a man

i Foster. 258. 1 Hawk. P. C. S4. 1 Fost. 299, 300.

<sup>1</sup> Lord Raym. 140. m Fost, 301, 1 Hawk. P. C. 77.

by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute.

2. WE are next to consider the crime of deliberate and wilful murder; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The words of the mofaical law (over and above the general precept to Noah P, that " whoso sheddeth " man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers q, "More-" over ye shall take no satisfaction for the life of a murder-" er, who is guilty of death, but he shall furely be put to " death; for the land cannot be cleanfed of the blood that " is shed therein, but by the blood of him that shed it." And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter) wherein the king himfelf is excluded the power of pardoning murder: fo that, were the king of England fo inclined, he could not imitate that Polish monarch mentioned by Puffendorf : who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, " nos, divini juris " rigorem moderantes, &c." But let us now consider the definition of this great offence.

THE name of murder (as a crime) was antiently applied only to the fecret killing of anothers: (which the word, moerda, fignifies in the Teutonic language<sup>t</sup>) and it was defined, "homicidium quod nullo vidente, nullo sciente, clam perpetraturu." for which the vill wherein it was committed, or (if that were

n 1 Hal. P. C. 470.

o 1 Hawk. P. C. 77.

P Gen. ix. 6.

<sup>9</sup> Numb. xxxv. 31.

r L. of N. b. 8. c. 3.

<sup>8</sup> Dial. de Scacch. 1. 1. c. 10.

t Stiernh. de jure Sueon. l. 3. c. 3. The word murdre in our old flatutes also fignified any kind of concealment or stifling. So in the statute of Exeter,

<sup>14</sup> Edw. I. "je riens ne celerai, ne suf-" ferai estre cele ne murdré:" which is thus translated in Fleta, l. 1. c. 18. §. 4. " Nullam veritatem celabo, nec celari per-" mittam nec murdrari." And the words " pur murdre le droit" in the articles of that statute, are rendered in Fleta itid. §. 8. " pro jure alicujus murdriendo."

u Glanv. 1. 14. c. 3.

too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated mur-This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood. unless they produced the murderer, to have perpetrated or at least connived at the murder x: and, according to Bractony. was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the conqueror, for the like fecurity to his own Normans 2. And therefore if, upon inquisition had, it appeared that the person found flain was an Englishman, (the presentment whereof was denominated englescherie 2) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. c. 4. we must now. (as is observed by Staundforde b) define murder in quite another manner, without regarding whether the party flain was killed openly or fecretly, or whether he was of English or foreign extraction.

MURDER is therefore now thus defined, or rather deferibed, by fir Edward Coke; "when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

FIRST, it must be committed by a person of sound memory and discretion: for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

NEXT, it happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing

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w Bract. 1. 3. tr. 2. c. 15. §. 7. Stat. Marlbr. c. 26. Fost, 281.

x Stiernh. 1. 3. c. 4.

y 1. 3. tr. 2. c. 15.

z 1 Hal. P. C. 447.

a Bract. ubi supr.

b P. C. l. 1. c. 10.

c 3 Inft. 47.

without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare affault, with intent to kill, is only a great misdemesnor, though formerly it was held to be murder d. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol or starving. But where they only differ in circumstance, as if a wound be alleged to be given with a fword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought f. And therefore by the statute 22 Hen. VIII. c. 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death: but this act did not live long, being repealed by I Edw. VI. There was also, by the antient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past 5: I mean by bearing false witness against another, with an express premeditated defign to take away his life, fo as the innocent perfon be condemned and executed b. The Gothic laws punished in this case, both the judge, the witnesses, and the profecutor; " peculiari poena judicem puniunt; peculiari tefles, " quorum fides judicem sedunit; peculiari denique et maxima " auctorem, ut bonicidami." And, among the Romans, the lex Cornelia, de ficariis, punished the false witness with death, as being guilty of a species of affassination k. And there is no doubt but this is equally murder in foro conscientiae as kill-

d 1 Hal. P. C. 425.

e 3 Inft. 319. 2 Hal. P. C. 185.

<sup>1 7</sup> Inft. 48. 7

Foit. 132. In the case of Macdaniei and Berry, reported by sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the

point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

h Mirror. c. 1. §. 9. Brit. c. 52. Bracton. 1. 3. c. 4.

i Stiernh. de jure Goth. 1. 3. c. 3.

k Ff. 48. 8. 4.

ing with a fword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital profecutions, if it must be at the peril of their own lives) has not yet punished it as fuch. If a man however does fuch an act, of which the probable confequence may be, and eventually is, death; fuch killing may be murder, although no ftroke be ftruck by himfelf, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his fick father to the air, against his will, by reason whereof he died1; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it m; and of the parish-officers, who shifted a child from parish to parish, till it died for want of care and fustenance ". So too, if a man hath a beast that is used to do mischief; and he, knowing it, fuffers it to go abroad, and it kills a man; even this is manflaughter in the owner: but if he had purpofely turned it loofe, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear or dog to worry themo. If a physician or furgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance P: but it hath been holden, that if it be not a regular physician or furgeon, who administers the medicine or performs the operation, it is manslaughter at the least q. Yet fir Matthew Hale very justly questions the law of this determination r. In order also to make the killing murder, it is requifite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first s.

FARTHER; the person killed must be " a reasonable creature in being, and under the king's peace," at the time of the

<sup>1 1</sup> Hawk. P. C. 78.

m 1 Hal. P. C. 432.

n Palm. 545.

<sup>9</sup> Ibid 431.

P Mirr. c. 4. 5. 16. See Vol. III.

pag. 122.

<sup>9</sup> Britt. c. 5. 4 Inft. 251.

r 1 Hal. P. C. 430.

<sup>5 1</sup> Hawk. P. C. 79.

killing. Therefore to kill an alien, a Jew, or an outlaw. who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of wart. To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reafon of the potion or bruifes it received in the womb, it feems, by the better opinion, to be murder in fuch as administered or gave them ". But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27. that if any woman be delivered of a child which if born alive should by law be a bastard; and endeavours privately to conceal it's death, by burying the child or the like; the mother fo offending shall fuffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which favours pretty strongly of feverity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French v: But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require fome fort of prefumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by it's parent) is admitted to convict the prisoner.

LASTLY, the killing must be committed with malice aforethought, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, malitia praecogitata, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart w: un disposition a faire un male chose x: and it may be either express, or implied in law. Express

t 3 Inft. 50. 1 Hal. P. C. 433.

v See Barrington on the statutes. 425.

u 3 Inft. 50. 1 Hawk. P. C. So.

w Foster. 256.

but fee 1 Hal. P. C. 433.

x 2 Roll. Rep. 461.

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malice is when one, with a fedate deliberate mind and formed defign, doth kill another: which formed defign is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted fchemes to do him fome bodily harm y. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their feconds also z. Yet it requires such a degree of passive valour, to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the infult. Also, if even upon a sudden provocation one beats another in a cruel and unufual manner. fo that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil defign, the genuine fense of malitia. As when a parkkeeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a mafter corrected his fervant with an iron bar, and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of flaughter a. Neither shall he be guilty of a less crime, who kills another in con-

y 1 Hal. P. C. 451.

<sup>7 1</sup> Hawk. P. C. 82.

a 1 Hal. P. C. 454.473, 474.

fequence of fuch a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief b, upon a horse used to strike, or coolly discharging a gun, among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, because of the unlawful act, the malitia praecogitata, or evil intended beforehand d.

Also in many cases where no malice is expressed, the law will imply it: as, where a man wilfully poifons another, in fuch a deliberate act the law prefumes malice, though no particular enmity can be proved e. And if a man kills another fuddenly, without any, or without a confiderable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of fuch an act, upon a flight or no apparent cause. No affront, by words or gestures only, is a fufficient provocation, fo as to excuse or extenuate fuch acts of violence as manifestly endanger the life of another . But if the person so provoked had unfortunately killed the other, by beating him in fuch a manner as thewed only an intent to chaftife and not to kill him, the law fo far confiders the provocation of contumelious behaviour, as to adjudge it only manilaughter, and not murder 3. In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his affiftants endeavouring to conferve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder b. And if one intends to do another felony,

b Lord Raym. 143.

<sup>-</sup> c 1 Hawk. P. C. 74.

a Toid. 24.

e 1 Hals P. C. 455.

f 1 Hawk. P. C. 82. 1 Hal. P. C.

<sup>455, 456.</sup> g Fost. 291.

h : Hal. P. C. 457. Foster, 308, 84

and undefignedly kills a man, this is also murder i. Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewife murder j. So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it k. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or felf-prefervation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by fome fudden and fufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the fatisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is prefumed to be malicious, until the contrary appeareth upon evidence!.

The punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place

i 1 Hal. P. C. 465.

j Ibid. 466.

k Ibid. 429.

Foft. 255.

m : Hal. P. C. 450.

n 23 Han. VIII. c. 1. I Edw. VI.

c. 12, 4 & 5 Ph. & M, c. 4.

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where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practifed in the cafe of notorious thieves. This, being quite contrary to the express command of the mosaical law, seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason for this practice, viz. that it is a comfortable fight to the relations and friends of the deceased P. But now in England, it is enacted by statute 25 Geo. II. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be funday, and then on the monday following) and that his body be delivered to the furgeons to be diffected and anatomized q; and that the judge may direct his body to be afterwards hung in chains, but in no wife to be buried without diffection. And, during the flort but awful interval between fentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge upon good and fufficient cause to respite the execution, and relax the other restraints of this act.

By the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being fcourged, the delinquents were fewed up in a leathern fack, with a live dog, a cock, a viper, and an ape, and fo cast into the sea. Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of fo unnatural a barbarity's. And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, we must account for

<sup>&</sup>quot; but thou shalt in any wise bury him " loco poena reddita, in quo latrones bomi-

<sup>&</sup>quot; that day, that the land be not de- " cidia feciffent." Ff. 48. 19. 28. §.15.

<sup>&</sup>quot; filed." Deut. xxi. 23.

p " Famosos latrones, in bis locis, ubi " grassati sunt, furca figendos placuit;

o "The body of a malefactor shall " ut, et conspectu deterreantur alii, et soet not remain all night upon the tree; " latio fit cognatis interemptorum, eoden

<sup>9</sup> Foft. 107.

r Ff. 48. 9. 9.

<sup>·</sup> Cic. pro S. Rofcio. 5. 25.

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the omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent s.

For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connexions, when coupled with murder, denominates it a new offence, no less than a species of treason, called parva proditio, or petit treason: which however is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the antient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign w.

PETIT treason, according to the statute 25 Edw. III. c. 2. may happen three ways: by a fervant killing his mafter, a wife her husband, or an ecclefiaftical person (either fecular. or regular) his fuperior, to whom he owes faith and obedience. A fervant who kills his master whom he has left, upon a grudge conceived against him during his fervice, is guilty of petit treason: for the traiterous intention was hatched while the relation fubfifted between them; and this is only an execution of that intention x. So if a wife be divorced a mensa et thoro, still the vinculum matrimonii subsists; and if she kills such divorced husband, she is a traitress y. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocefan bishop: and therefore to kill any of these is petit treason. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in

f 1 Hal. P. C. 380.

t Foster. 107. 324. 336.

u See pag. 75.

w "Omnium gravissima censetur vis s facta ab incolis in patriam, subditis in

<sup>&</sup>quot; regem, liberis in parentes, maritis in uxo-

<sup>&</sup>quot; res, (et vice versa) servis in dominos,

<sup>&</sup>quot; aut etium ab homine in semet ipsum."
Stiernh. de jurc Goth. l. 3. c. 3.

x 1 Hawk. P.C.89. 1 Hal.P.C.330.

y 1 Hal. P. C. 381.

z Ibid.

it's most edious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III 2. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder b: and in fuch case it should feem that two witnesses are not necessary, as in case of petit treafon they are. Which crime is also distinguished from murder in it's punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and in a woman, to be drawn and burned c (a): the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which condemned a woman to be burned for murdering her hufband it is now the usual punishment for all forts of treasons committed by those of the female fex c. Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7. which has been fince extended to their aiders, abettors, and counfellors, by flatutes 23 Hen-VIII. c. 1. and 4 & 5 P. & M. c. 4.

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a Foft. 337.

b Foster. 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.

c 1 Hal. P. C. 3S2. 3 Inft. 311.

d Caefar de bell. Gall. 1, 6. c. 18.

e See pag. 93.

<sup>(</sup>a) But this is now altered by statute 30 Geo. 3. c. 48. which enacts that in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned: and if any woman shall be convicted of petit treason she shall be liable to fuch farther pains and penalties as are declared by statute 25 Geo. III. c. 37. with respect to persons convicted of wilful murder,

CHAPTER THE FIFTEENTH.

## OF OFFENCES AGAINST THE PER-SONS OF INDIVIDUALS.

HAVING in the preceding chapter confidered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemessnors, as more peculiarly affect the security of his person, while living.

Or these some are selonious, and in their nature capital: others are simple misdemessnors, and punishable with a lighter animal version. Of the selonies the first is that of maybem.

I. MAYHEM, maybemium, was in part confidered in the preceding volume, as a civil injury: but it is also looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and affistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary b. And therefore the cutting off, or disabling, or weakening a man's hand or singer, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to

a See Vol. III. pag. 121. b Brit. 1. 1. c. 25. 1 Hawk. P. C. 111. Vol. IV.

be mayhems. But the cutting off his ear, or nofe, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

By the antient law of England he that maimed any man, whereby he lost any part of his body, was fentenced to lose the like part; membrum pro membro : which is still the law in Sweden d. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn c, is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with sine and imprisonment in unless perhaps the offence of mayhem by castration, which all our old writers held to be felony; "et sequi turn aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione in And this, although the mayhem was committed upon the highest provocation."

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his tengue, or putting out his eyes, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as fir Edward Coke explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall maliciously and unlawfully cut off the ear of any of the king's subjects, he shall not only forfeit treble damages to

a 3 Inft. 118.—Mes, si la pleynte soit fuite de semme qu' avera vollet a bome ses membres, en tiel case perdra le seme la une meyn par jugement, come le membre dount cie avera tresseasse. (Brit. c. 25)

d Stiernhook de jure Sucon. l. 3. t. 3.

e See pag. 12.

f 1 Hawk. P. C. 112.

<sup>&</sup>amp; Bract. fol. 144.

b Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (Clauf. 13 Hen. III.m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

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the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 101 by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1. called the Coventry act; being occasioned by an affault on sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice asorethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, with intent to maim or to dissignire him; such person, his counsellors, aiders, and abettors, shall be guilty of selony without benefit of clergy k.

Thus much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person, in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow; but, being half a mad-

k On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of flitting the nose of Mr. Crispe, Coke's brother-inlaw. The case was somewhat fingular. The murder of Crifpe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure, with an intent to disfigure, is made fo by this statute; on which they were therefore indicted. And Coke, who was a difgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the affault was not com-

mitted with an intent to disfigure, but with an intent to murder; and therefore not within the flatute. But the court held, that if a man attacks another to murder him with fuch an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this ftatute; and it shall be left to the jury whether it were not a defign to murder by disfiguring, and confequently a malicious intent to disfigure as well as to mur-Accordingly the jury found them guilty of fuch previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

man, was never executed, but confined in prison, where he died about thirty years after (1).

II. THE fecond offence, more immediately affecting the personal security of individuals, relates to the semale part of his majesty's subjects; being that of their forcible abduction and marriage; which is vulgarly called sealing an heires. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wise, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such missoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal selons: and by statute 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories before the fact.

In the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute 1. 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent m. 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will m: and so vice versa, if the woman be originally taken away with her own consent, yet if she afterwards resuse to continue with the offender, and be forced against her will, she may, from that time, as properly

<sup>1 1</sup> Hawk. P. C. 110.

n 1 Hal. P. C. 660.

m 1 Hal. P. C. 660. 1 Hawk. P. C. 109.

officer of the navy, customs, or excise, in the execution of his duty, is made felony without benefit of clergy by statute 24 Geo. 3 sess. 2. c. 47. s. 11.

be faid to be taken against her will, as if she never had given any confent at all; for, till the force was put upon her, the was in her own power o. It is held that a woman, thus taken away and married, may be fworn and give evidence against the offender, though he is her husband de facto; contrary to the general rule of law: because he is no husband de jure, in cafe the actual marriage was also against her will P. In cases indeed where the actual marriage is good, by the confent of the inveigled woman obtained after her forcible abduction, fir Matthew Hale feems to question how far her evidence should be allowed: but other authorities q feem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.

An inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any person, above the age of fourteen, unlawfully shall convey or take away any woman child unmarried, (which is held to extend to bastards as well as to legitimate children,) within the age of fixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the difcretion of the justices: and if he deflowers fuch maid or woman child, or without the confent of parents contracts matrimony with her, he shall be imprisoned five years, or fined at the discretion of the justices, and she shall forfeit all her lands to her next of kin, during the life of her faid husband. So that as these stolen marriages, under the age of fixteen, were usually upon mercenary views, this act, befides punishing the feducer, wifely removed the temptation. But this latter part of the act is now rendered

r Stra. 1162.

o 1 Hawk. P. C. 110.

P 1 Hal. P. C. 661.

<sup>9</sup> Cro. Car. 488. 3 Keb. 193. State Trials. V. 455.

almost useless, by provisions of a very different kind, which make the marriage totally void's, in the statute 26 Geo. II. c. 33.

III. A THIRD offence, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of rape, raptus mulierum, or the carnal knowlege of a woman forcibly and against her will. This, by the Jewish law , was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mofaic law.

THE civil law u punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law fufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: " five volentibus, five nolentibus mulieribus, tale facinus fuerit " perpetratum." And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray, without the seduction and arts of the other fex : and therefore, by restraining and making so highly penal the solicitations of the men, they meant to fecure effectually the honour of the women. " enim ipfi raptores metu, vel atrocitate poenae, ab hujufmodi fa-

<sup>&</sup>quot; cinore fe temperaverint, nulli mulieri, five volenti, five nolenti, " peccandi locus relinquetur; quia hoc ipfum velle mulierum, ad

<sup>&</sup>quot; insidiis nequissimi hominis, qui meditatur rapinam, inducitur.

<sup>\*</sup> See Vol. I. p. 437, &c.

<sup>1</sup> Deut. xxii, 25.

" Nist etenim earn solicitaverit, nist odiosis artibus circumvenerit, non faciet earn velle in tantum dedecus sese prodere." But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will,

RAPE was punished by the Saxon laws, particularly those of king Athelstan w, with death: which was also agreeable to the old Gothic or Scandinavian conflitution x. But this was afterwards thought too hard: and in it's flead another fevere, but not capital, punishment, was inflicted by William the conqueror; viz. castration, and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accufations, it was then the law, (and, it feems, still continues to be so in appeals of rape 2) that the woman should immediately after. " dum recens fuerit maleficium," go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage a, This feems to correspond in some degree with the laws of Scotland and Arragon b, which require that complaint must be made within twenty-four hours; though afterwards by statute Westm. 1. c. 13. the time of limitation in England was extended to forty days. At prefent there is no time of limitation fixed: for, as it is usually now punished by indictment at the fuit of the king, the maxim of law takes place, that nuthum tempus occurrit regi: but the jury will rarely give credit to a flake complaint. During the former period also it was held for law c, that the woman (by confent of the judge and her parents) might redeem the offender from the execution of his fentence, by accepting him for her hufband; if he also was willing to agree to the exchange, but not otherwise.

w Bracton. 1. 3. c. 28.

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a Gianv. 1. 14. c. 6. Bract. 1. 3. c. 28.

x Stiernh. de jure Sucon. 1. 3. c. 2.

b Barrington. 142.

y I.L. Guil. Conqu. c. 19.

c Glanv. 1. 14. c. 6. Bract. 1. 3.

<sup>7 1</sup> Hal. P. C. 632.

<sup>6. 28.</sup> 

In the 3 Edw. I. by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offence itself, of ravishing a damsel within age, (that is, twelve years old) either with her confent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I. found necessary to make the offence of forcible rape felony by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years; in which case the consent or non-confent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion, that fuch profligate actions committed on an infant under the age of twelve years, the age of female difcretion by the common law, either with or without confent, amount to rape and felony; as well fince as before the statute of queen Elizabeth d: but that law has in general been held only to extend to infants under ten; though it should feem that damfels between ten and twelve are still under the protection of the statute Westm. 1. the law with respect to their seduction not having been altered by either of the subsequent statutes.

A MALE infant, under the age of fourteen years, is prefumed by law incapable to commit a rape, and therefore it feems cannot be found guilty of it. For though in other felonies malitia fupplet aetatem, as has in some cases been shewn; yet, as to this particular species of felony, the law supposes an imbecillity of body as well as mind.

THE civil law feems to suppose a profitute or common harlot incapable of any injuries of this kind f: not allowing

d 1 Hal. P. C. 631.

f Cod. 9. 9. 22. Ff. 47. 2. 39.

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any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life; for, as Bracton well observes, "licet me"retrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus consentire noluit."

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from fir Matthew Hale; with regard to the competency and credibility of witnesses; which may, salvo pudore, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be lest to the jury upon the circumstances of fact that concur in that testimony. For instance; if the witness be of good same; if she presently discovered the offence, and made search for the offender; if the party accused sled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil same, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might

8 1 Hal. P. C. 629. 1 Hawk. P. C. 108. h fol. 147.

have been heard, and she made no outcry: these and the like circumstances carry a strong, but not conclusive, prefumption that her testimony is false or seigned.

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be fensible of the wickedness of telling a deliberate lye. Nay, though she hath not, it is thought by fir Matthew Hale i that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, fince the nature of the case admits frequently of no better proof. But it is now fettled, [Brazier's cafe, before the twelve judges, P. 19 Geo. III.] that no hearfay evidence can be given of the declarations of a child who hath not capacity to be fworn, nor can fuch child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded fingly on the unsupported accusation of an infant under years of discre-There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or fuch as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

"IT is true, fays this learned judge;, that rape is a most detestable crime, and therefore ought severely and impar-

i 1 Hal. P. C. 634.

"tially to be punished with death; but it must be remembered, that it is an accusation easy to be made, hard to be
proved, but harder to be defended by the party accused,
though innocent." He then relates two very extraordinary
cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus; "I
mention these instances, that we may be the more cautious
upon trials of offences of this nature, wherein the court
and jury may with so much ease be imposed upon, without
great care and vigilance; the heinousness of the offence
many times transporting the judge and jury with so much
indignation, that they are overhastily carried to the conviction of the person accused thereof, by the consident testimony of sometimes salse and malicious witnesses."

IV. What has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if salse, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in it's very indictments, as a crime not sit to be named; "peccatum illud borribile, inter "christianos non nominandum "." A taciturnity observed likewise by the edict of Constantius and Constans!; "ubi scelus "est id, quod non proficit scire, jubemus insurgere leges, armari

k See in Ret. Parl. 50 Edw. III. n. "named." (12 Rep. 37.)
58. a complaint, that a Lombard did 1 Cod. 9. 9. 31.
commit the fin "that was not to be

" jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt rei." Which leads me to add a word concerning it's punishment.

This the voice of nature and of reason, and the express law of God m, determine to be capital. Of which we have a fignal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: fo that this is an universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding fuch miscreants to be burnt to death "; though Fleta o fays they should be buried alive: either of which punishments was indifferently used for this crime among the antient Goths P. But now the general punishment of all felonies is the fame, namely, by hanging: and this offence (being in the times of popery only subject to ecclesiastical cenfures) was made felony without benefit of clergy by flatute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, agentes et consentientes pari poena plectantur9.

THESE are all the felonious offences more immediately against the personal security of the subject. The inferior offences, or misdemessnors, that fall under this head, are assaults, batteries, wounding, false imprisonment, and kidnapping.

V, VI, VII. WITH regard to the nature of the three first of these offences in general, I have nothing farther to add to what has already been observed in the preceding book of these commentaries; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with sines and imprisonment; or with other ignominious corporal penalties, where they are committed

m Levit. xx. 13. 15.

a Brit. c. 9.

o 1. 1. c. 37.

P Stiernh. de jure Goth. l. 3. c. 2.

<sup>9 3</sup> Inft. 59.

r See Vol. III. pag. 120.

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with any very atrocious defign s. As in case of an affault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional affaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: or, when both parties are consenting to an unnatural attempt, it is usual not to charge any assault; but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime beforementioned. And, in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.

THERE is also one species of battery, more atrocious and penal than the rest, which is the bearing of a clerk in orders, or clergyman; on account of the respect and reverence due to his facred character, as the minister and embassador of peace. Accordingly it is enacted by the statute called articuli cleri, 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the affailant may also be fued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be fued for before the bishop; whereas otherwife to fue in any spiritual court, for civil damages for the battery, falls within the danger of praemuniret. But fuits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance ". So that upon the whole it appears, that a person guilty of fuch brutal behaviour to a clergyman, is subject to three kinds of profecution, all of which may be purfued for one and the same offence: an indictment, for the breach of the king's peace by fuch affault and battery; a civil action, for the special damage sustained by the party injured; and a fuit in the ecclesiastical court, first, pro correctione et salute

<sup>1</sup> Hawk. P. C. 65.

u Artic. Cler. 9 Edw. II. c. 4. F.N.B.

animae by enjoining penance, and then again for such sum of money as shall be agreed on for taking off the penance enjoined: it being usual in those courts to exchange their spiritual censures for a round compensation in money v; perhaps because poverty is generally esteemed by the moralists the best medicine pro salute animae.

VIII. THE two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which, false imprisonment, it's nature and incidents, I must content myself with referring the student to what was observed in the preceding volume w, when we confidered it as a mere civil injury. besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of it's members, and for the infringement of the good order of fociety. We have feen before that the most atrocious degree of this offence, that of fending any subject of this realm a prisoner into parts beyond the feas, whereby he is deprived of the friendly affiftance of the laws to redeem him from fuch his captivity, is punished with the pains of praemunire, and incapacity to hold any office, without any possibility of pardon y. And we may also add, that by statute 43 Eliz. c. 13. to carry any one by force out of the four northern counties, or imprison him within the fame, in order to ranfom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessories before the fact. Inferior degrees of the same offence, of false imprisonment, are also punishable by indictment, (like affaults and batteries) and the delinquent may be fined and imprisoned 2. And indeed a there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemessnors whatfoever, of a notoriously evil example, may be indicted at the fuit of the king.

<sup>2</sup> Roll. Rep. 384.

<sup>\*</sup> See Vol. III. pag. 127.

<sup>#</sup> See pag. 116.

y Stat. 31 Car. II. c. 2.

z West. Symbol. part 2. pag. 92.

a 1 Hawk. P. C. 210.

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IX. THE other remaining offence, that of kidnapping, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and fending them into another, was capital by the Jewish law. "He that stealeth " a man, and felleth him, or if he be found in his hand, he " shall furely be put to deathb." So likewise in the civil law. the offence of fpiriting away and ftealing men and children; which was called plagium, and the offender plagiarii, was punished with death c. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in it's confequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory d. And also the statute 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant veffel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and defirous to return, he shall suffer three months imprisonment. And thus much for offences that more immediately affect the persons of individuals.

b Exod. xxi. 16.

e Ff. 48. 15. 1.

d Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

#### CHAPTER THE SIXTEENTH.

## OF OFFENCES AGAINST THE HABI-TATIONS OF INDIVIDUALS.

THE only two offences, that more immediately affect the habitations of individuals or private subjects, are those of arson and burglary.

I. Arson, ab ardendo, is the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offence against that right, of habitation, which is acquired by the law of nature as well as by the laws of fociety; next, because of the terror and confusion that necessarily attend it; and laftly, because in simple theft the thing stolen only changes it's master, but still remains in esse for the benefit of the public, whereas by burning the very fubstance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: fince murder, atrocious as it is, feldom extends beyond the felonious act defigned; whereas fire too frequently involves in the common calamity perfons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law a punishes with death such as maliciously fet fire to houses in towns, and contiguous to others; but is more merciful to fuch as only fire a cottage, or house, standing by itself.

Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offence: next, wherein the offence itself consists, or what amounts to a burning of such house; and lastly, how the offence is punished.

1. Nor only the bare dwelling house, but all out-houses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arfon b. And this by the common law: which also accounted it felony to burn a fingle barn in the field, if filled with hay or corn, though not parcel of the dwelling house c. The burning of a flack of corn was antiently likewise accounted arfon d. And indeed all the niceties and diffinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly fo called) may be committed by wilfully fetting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's c. For by the common law no intention to commit a felony amounts to the fame crime: though it does, in fome cases, by particular statutes. However fuch wilful firing one's own house, in a town, is a high misdemesnor, and punishable by fine, imprisonment, pillory, and perpetual fureties for the good behaviourf. And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the leafe, the house is the property of the tenant 8.

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1 Hal. P. C. 567.
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c 3 Inft. 69.

<sup>1</sup> Hawk. P. C. 105.

e Cio. Car. 377. 1 Jon. 351.

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<sup>1</sup> Hal. P. C. 568. 1 Hawk. P. C.

<sup>106.</sup> 

g Fost. 115.

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- 2. As to what shall be faid to be a burning, so as to amount to arfon a bare intent, or attempt to do it, by actually fetting fire to an house, unless it absolutely burns, does not fall within the description of incendit et combustit; which were words necessary, in the days of law-latin, to all indictments of this fort. But the burning and confuming of any part is fufficient; though the fire be afterwards extinguished h. Also it must be a malicious burning; otherwise it is only a trespass: and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to fet fire to the thatch of a house, this fir Matthew Hale determines not to be felony, contrary to the opinion of former writers i. But by statute 6 Ann. c. 31. any fervant, negligently fetting fire to a house or outhouses, shall forfeit 1001, or be sent to the house of correction for eighteen months: in the fame manner as the Roman law directed " eos, qui negligenter ignes apud se habuerint, fusibus " vel flagellis caedi k."
- 3. The funishment of arfon was death by our antient Saxon laws. And, in the reign of Edward the first, this sentence was executed by a kind of lex talionis; for the incendiaries were burnt to death ": as they were also by the Gothic constitutions". The statute 8 Hen. VI. c. 6. made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to selony by the general acts of Edward VI and queen Mary; and now the punishment of all capital selonies is uniform, namely, by hanging. The offence of arson was denied the benefit of clergy by statute 21 Hen. VIII. c. 1. but that statute was repealed by 1 Edw. VI. c. 12. and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. & M. c. 4.

h 1 Hawk. P. C. 106.

<sup>1</sup> r Hal. P. C. 569.

k Ff. 1. 15. 4.

<sup>1</sup> LL. Inae. c. 7.

m Britt. c. 9.

n Stiernh. de jure Gotb. 1. 3. c. 6.

which expressly denied it to the accessory before the facto; though now it is expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal housebreaking, burgi latrocinium, which by our antient law was called hamesecken, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it natnaally carries with it, but also as it is a forcible invalion and disturbance of that right of habitation, which every individual might acquire even in a flate of nature; an invalion, which in fuch a state would be fure to be punished with death, unless the affailant were the stronger. But in civil fociety, the laws also come in to the affistance of the weaker party: and, befides that they leave him this natural right of killing the aggressor, if he can, (as was shewn in a former chapter p) they also protect and avenge him, in case the might of the affailant is too powerful. And the law of England has fo particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never fuffer it to be violated with impunity: agreeing herein with the fentiments of antient Rome, as expressed in the words of Tully 9; " quid enim fanctius, quid omni religione " munitius, quam domus uniuscujusque civium?" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal causes, the public fafety superfedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendaries: and to this principle it must be assigned, that a man may affemble people together lawfully (at least if they do not exceed eleven) without danger of raifing a riot, rout, or unlawful affembly, in order to protect and defend his house; which he is not permitted to do in any other cafe .

<sup>9 11</sup> Rep. 35. 2 Hal. P. C. 346, 9 pro-domo, 41.
347. Foster. 336.
P See pag. 180.

THE definition of a burglar, as given us by fir Edward Coke', is, "he that by night breaketh and entereth into a "mansion-house, with intent to commit a selony." In this definition there are sour things to be considered; the time, the place, the manner, and the intent.

1. THE time must be by night, and not by day: for in the day time there is no burglary. We have feen't, in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the affailant with impunity. As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at funrifing, and to end immediately upon fun-fet; but the better opinion feems to be, that if there be daylight or crepufculum enough, begun or left, to difcern a man's face withal, it is no burglary ". But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from it's being done in the dark, as at the dead of night; when all the creation, except beafts of prey, are at reft; when fleep has difarmed the owner, and rendered his caftle defencelefs.

As to the place. It must be, according to fir Edward Coke's definition, in a mansion house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is domus mansionalis Deiv. But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a town in the night w; though that perhaps fir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be "nocturna diruptic alicujus

<sup>\* 3</sup> Inft. 63. v 3 Inft. 64. \* See pag. 180, 181. w Spehn. Gloff. t. Burglary. 1 Hawk. \* 3 Inft. 63. 1 Hal. P. C. 350. P. C. 103.

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s habitaculi, vel ecclesiae, etiam murorum portarumve burgi, ad " feloniam perpetrandam." And therefore we may fafely conclude, that the requisite of it's being domus mansionalis is only in the burglary of a private house: which is the most frequent, and in which it is indifpenfably necessary to form it's guilt, that it must be in a mansion or dwelling house. For no diftant barn, warehouse, or the like, are under the fame privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansionhouses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, animo revertendi, is the object of burglary; though no one be in it, at the time of the fact committed x. And if the barn, stable, or warehouse, be parcel of the mansion-house and within the same common sence y, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's branches and appurtenants, if within the curtilage or home-stall 2. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion house of the owner. So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But, if the owner himfelf lies in the house, and hath but one outward door at which he and his lodgers enter, fuch lodgers feem only to be inmates, and all their apartments to be parcel of the one dwelling house of the owner b. Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the manfion-house of the corporation, and not of the respective officers c. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwellinghouse, nor can burglary be committed therein: for by the

x 1 Hal. P. C. 566. Fost. 77.

P. C. 104. y Kev. Garland. P. 16 Geo. III. by a 1 Hal. P. C. 556.

all the judges.

b Kel. 84. 1 Hal. P. C. 556.

<sup>2 1</sup> Hal. P. C. 5583 1 Hawk.

c Foster. 38, 39.

lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie thered. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge thereing for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances.

3. As to the manner of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars f. There must in general be an actual breaking; not a mere legal claufum fregit, (by leaping over invifible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloofing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is fog. But to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permit. So also to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to fearch for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was

d r Hal. P. C. 558.

e 1 Hawk. P. C. 104.

<sup>1 1</sup> Hal. P. C. 551.

g Ibid. 553.

h 1 Hawk, P. C. 102. 1 Hal. P. C.

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no actual breaking: for the law will not fuffer itself to be trifled with by fuch evafions, especially under the cloke of legal process. And so, if a servant opens and enters his master's chamber door with a felonious design: or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with fuch evil intent; it is burglary. Nay, if the fervant conspires with a robber, and lets him into the house by night, this is burglary in both k: for the fervant is doing an unlawful act, and the opportunity afforded him, of doing it with greater eafe, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an inftrument held in the hand, is fufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a piltol to demand one's money, are all of them burglarious entries 1. The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7. if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or, being in such house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon m holding the affirmative, and fir Matthew Hale n the negative. But it is univerfally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that fuch breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a

i 1 Hawk. P. C. 102.

k Stra. 881. 1 Hal. P. C. 553.

<sup>1</sup> Hawk. P. C. 103.

<sup>1 1</sup> Hal. P. C. 555. 1 Hawk. P. C.

<sup>103.</sup> Fost: 108.

m Elem. 65.

n 1 Hal. P. C. 554.

robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created fo by statute; fince that statute. which makes an offence felony, gives it incidentally all the properties of a felony at common lawo.

Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. statutes however of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and acceffories before the fact P. And, in like manner, the laws of Athens, which punished no fimple theft with death, made burglary a capital crime %

o 7 Hawk. P. C. 105!

the plate glass company, with intent to for seven years. steal the stock or utenfils, is by statute

<sup>13</sup> Geo. III. c. 38. declared to be fingle P Burglary in any house belonging to felony, and punished with transportation

<sup>9</sup> l'ott. Antiq. b. 1. c. 26.

### CHAPTER THE SEVENTEENTH.

# OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next, and last, species of offences against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; larciny, and malicious mischies: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of forgery. Of these three in their order.

I. LARCINY, or theft, by contraction for latrociny, latrocinium, is diftinguished by the law into two forts; the one called fimple larciny, or plain theft unaccompanied with any other atrocious circumstance; and mixed or compound larciny, which also includes it in the aggravation of a taking from one's house or person.

And, first, of fimple larciny: which, when it is the stealing of goods above the value of twelvepence, is called grand larciny; when of goods to that value, or under, is petit larciny: offences, which are considerably distinguished in their punishment, but not otherwise. I shall therefore first consider the nature of simple larciny in general; and then shall observe the different degrees of punishment inslicted on it's two several branches.

SIMPLE larciny then is "the felonious taking, and car"rying away, of the perfonal goods of another." This offence

fence certainly commenced then, whenever it was, that the bounds of property, or laws of meum and tuum, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little dissiculty. The disturbance of any individual, in the occupation of what he has seised to his present use, seems to be the only offence of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen a, any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt. At present we will examine the nature of thest, or larciny, as laid down in the foregoing definition.

I. I'r must be a taking. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon truft, can ground a larciny. As if A lends B a horse, and he rides away with him; or, if I fend goods by a carrier, and he carries them away; these are no larcenies b. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcinies: for here the animus furandi is manifest; since in the first case he had otherwise no inducement to open the goods, and in the fecond the trust was determined, the delivery having taken it's effect. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larciny in any fervant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI. c. 1. the servants of persons deceased, accused of embezzling their master's goods, may by writ out of chancery (issued by the advice of

<sup>2</sup> See Vol. II. pag. 8, &c.

b 1 Hal. P. C. 504.

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the chief justices and chief baron, or any two of them) and proclamation made thereupon, be fummoned to appear perfonally in the court of king's bench, to answer their master's executors in any civil fuit for fuch goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7. if any fervant embezzles his mafter's goods to the value of forty shillings, it is made felony; except in apprentices, and fervants under eighteen years old. But if he had not the possession, but only the care and overfight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law d. So if a guest robs his inn or tavern of a piece of plate, it is larciny; for he hath not the possession delivered to him, but merely the use c, and so it is declared to be by statute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furnished lodgings. fome circumstances also a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge fuch bailee with the value; or if he robs his own messenger on the road, with intent to charge the hundred with the loss according to the statute of Winchester f.

2. There must not only be a taking, but a carrying away: cepit et asportavit was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the sact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larciny s. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larciny h.

d 1 Hal. P. C. 506.

e 1 Hawk. P. C. 90.

f Foster, 123, 124.

g 3 Inst. 108, 109.

h I Hawk. P. C. 93.

- 3. This taking, and carrying away, must also be felonious; that is, done animo furandi: or, as the civil law expresses it, lucri causa i. This requisite, besides excusing those who labour under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book k) indemnifies also mere trespassers, and other petty offenders. As if a fervant takes his mafter's horse, without his knowlege, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrein another's cattle, or seise them: all these are misdemesnors and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larciny the variety of circumstances is fo great, and the complications thereof fo mingled, that it is impossible to recount all those, which may evidence a felonious intent, or animum furandi: wherefore they must be left to the due and attentive consideration of the court and jury.
- 4. This felonious taking and carrying away must be of the personal goods of another: for if they are things real, or savour of the reality, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larciny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of thest, being absolutely fixed and immoveable m. And if they were

i Inft. 4. 1. 1.

<sup>2</sup> Sec pag. 20.

<sup>1 1</sup> Hal. P. C. 509.

m See Vol. II. p. 16.

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fevered by violence, fo as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be faid to be taken from the proprietor, in this their newly acquired state of mobility, (which is effential to the nature of larciny) being never, as fuch, in the actual or constructive possession of any one, but of him who committed the trespass. could not in strictness be faid to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. thief fevers them at one time, whereby the trespass is completed, and they are converted into perfonal chattels, in the constructive possession of him on whose soil they are left or laid; and comes again at another time, when they are for turned into personalty, and takes them away; it is larciny: and so it is, if the owner, or any one else, has severed them ". And now, by the statute 4 Geo. II. c. 32. to steal, or rip, cut, or break, with intent to fteal, any lead, or iron bar, rail, gate, or palifado, fixed to a dwelling-house or out-house, or in any court or garden thereunto belonging, or to ary other building, is made felony, liable to transportation for seven years; and to fteal, damage, or deftroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwife destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or the roots of madder when growing, are o punishable criminally, by whipping, fmall fines, imprisonment, and fatisfaction to the party wronged, according to the nature of the offence. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants to the value of 5s, is by fratute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchasers thereof knowing the same to be stolen: and by statutes 6 Geo. III. c. 48. and 13 Geo. III. c. 33. the stealing of any timber trees therein specified p, and of any root,

n 3 Inst. 109. 1 Hal. P. C. 510. 9 Geo. III. c. 41. 13 Geo. III. c. 32.

P Oak, beech, chefnut, walnut, aih, O Stat. 43 Eliz. c. 7. 15 Car. II. elm, cedar, fir, afp, lime, sycamore, C. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. birch, poplar, alder, larch, maple, and hornbeam.

shrub, or plant, by day, or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony liable to transportation for seven years. Stealing ore out of mines is also no larciny, upon the same principle of adherence to the freehold; with an exception only to mines of black lead, the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding feven years; and to escape from such imprisonment, or return from fuch transportation, is felony without benefit of clergy; by statute 25 Geo. II. c. 10. Upon nearly the fame principle the stealing of writings relating to a real estate is no felony, but a trespass q: because they concern the land, or (according to our technical language) favour of the realty, and are confidered as part of it by the law; fo that they defcend to the heir together with the land which they concern '.

Bonds, bills, and notes, which concern mere choses in action, were also at the common law held not to be such goods whereof larciny might be committed; being of no intrinfe value f, and not importing any property in possession of the perfon from whom they are taken. But by the statute 2 Geo. II. c. 25. they are now put upon the fame footing, with respect to larcinies, as the money they were meant to secure. By statute 15 Geo. II. c. 13. officers or servants of the bank of England, fecreting or embezzling any note, bill, warrant, bond, deed, fecurity, money, or effects, intrusted with them or with the company, are guilty of felony without benefit of clergy. The fame is enacted by flatute 24 Geo. II. c. 11. with respect to officers and servants of the south-sea company. And, by statute 7 Geo. III. c. 50. if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or pacquet, containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or pacquet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or pac-

\* See Vol. 11. pag. 438.

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<sup>9 1</sup> Hal. P. C. 510. Stra. 1137. f 8 Dep. 33.

quet with which he has received money for the postage, or shall advance the rate of postage on any letter or pacquet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. Larciny also could not at common law be committed of treasure-trove, or wreck, till seized by the king or him who hath the franchise for till such seisure no one hath a determinate property therein. But by statute 26 Geo. II. c. 19. plundering or stealing from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law, this inhumanity is punished in the same degree as the most atrocious thest.

LARCINY also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beafts that are ferae naturae, and unreclaimed, fuch as deer, hares, and conies, in a forest, chace, or warren; fish, in an open river or pond; or wild fowls at their natural liberty t. But if they are reclaimed or confined, and may ferve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in atrunk, and pheafants or partridges in a mew, larciny may be committed ". And now, by statute o Geo. I. c. 22. to hunt, wound, kill, or fteal any deer; to rob a warren; or to fteal fish from a river or pond; (being in these cases armed and disguised) also to hunt, wound, kill, or steal any deer, in the king's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy. And the statute 16 Geo. III. c. 30. enacts, that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in any forest, chase, purlieu, or antient walk, or in any inclesed park, paddock, wood, or other ground,

<sup>\*</sup> Cod. 6. 2. 18.

<sup>4 1</sup> Hawk. P. C. 94. 1 Hal. P. C. 511.

<sup>1</sup> Hal. P. C. 511. Foft. 366.

where deer are usually kept, shall forfeit the sum of 201, or for every deer actually killed, wounded, destroyed, taken in any toyl or fnare, or carried away, the fum of 30 1, or double those sums in case the offender be a keeper: and, upon 2 fecond offence (whether of the fame or a different species) shall be guilty of felony, and transportable for seven years, Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the faid offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies y by night in open warrens: and a forfeiture of five pounds, to the owner of the fishery, is made payable by persons taking or destroying (or attempting so to do) any fish in any river or other water within any inclosed ground, being private property. Stealing hawks, in difobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony w. It is also said x that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though enmarked, if in any private river or pond; otherwise it is only a trespass. But, of all valuable domestic animals, as horses and other beasts of draught, and of all animals domitae naturae, which ferve for food, as neat or other cattle, fwine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wooly, larciny may be committed; and also of the slesh of such as are either domitae or ferae naturae, when killed 2. As to those

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v See Stat. 22 & 23 Car. II. c. 25.

w 3 Inft. 98.

x Dalt. Juft. c. 156.

y Dal. 21. Crompt. 36. 1 Hawk.

P. C. 93. I Hal. P. C. 507. The King v. Martin, by all the judges. P. 17 Geo. III.

z 1 Hal. P. C. 511.

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animals, which do not ferve for food, and which therefore the law holds to have no intrinsic value, as dogs of all forts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them <sup>2</sup>, yet they are not of such estimation, as that the crime of stealing them amounts to larciny<sup>2</sup>. But by statute 10 Geo. III. c. 18. very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inslicted by two justices of the peace, (with a very extraordinary mode of appeal to the quarter sessions) on such as steal, or knowingly harbour a stolen dog, or have in their custody the skin of a dog that has been stolen <sup>b</sup>.

Notwithstanding however that no larcing can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to steal it; and an indictment will lie, for the goods of a person unknown c. In like manner as, among the Romans, the lex Hostilia de furtis, provided that a profecution for theft might be carried on without the intervention of the owner d. This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpfe itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it . Very different from the law of the Franks, which feems to have respected both as equal offences; when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one fuffered to relieve his wants, till the relations of the deceased consented to his readmission f.

Having thus confidered the general nature of simple larciny, I come next to treat of it's punishment. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured s. And in the civil law, till

<sup>2</sup> See Vol. II. pag: 393.

a 1 Hal. P. C. 512.

b See the remarks in pag. 4. This flatute bath now continued fixteen fefflens of parliament unrepealed!

c 1 Hal, P. C. 512.

d Gravin. 1. 3. §. 106.

e See Vol. II. pag. 429.

f Montesq. Sp. L. b. 30, ch. 19.

g Exod. c. xxii.

fome very late constitutions, we never find the punishment capital. The laws of Draco at Athens punished it with death: but his laws were faid to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulc, And fo the Attic laws in general continued h; except that once, in a time of dearth, it was made capital to break into a garden, and steal figs: but this law, and the informers against the offence, grew fo odious, that from them all malicious informers were styled sycophants; a name which we have much perverted from it's original meaning. From thefe examples, as well as the reason of the thing, many learned and fcrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft i. And certainly the natural punishment for injuries to property feems to be the loss of the offender's own property: which ought to be univerfally the case, were all men's fortunes equal. But as those, who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment; yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas Morej, and the marquis Beccaria k, at the diffance of more than two centuries from each other, have very fenfibly proposed that kind of corporal punishment, which approaches the nearest to a pecuniary satisfaction; viz. a temporary impriforment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most flavish kind: in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But notwithstanding

h Fetit. LL. Attic. 1. 7. tit. 5.

wit; ne putemus Deum, in nova lege clomentiae qua pater imperat filiis, majoren indulfisse nobis invicem saewiendi licentiam. Haec sunt cur non licero putem: quam vete sit absurdum, atque etiam perniciosum reipublicae, surem atque bomicidam exaeque puniri, nemo est (opinor) qui nescita (1bid. 39.)

i Est enim ad windicanda surta nimis etrox, nectamen ad refraenanda sufficiens: quippe neque surtum simplex tam ingens sacinus est, ut capite debeat plecti; neque ulla poena est tanta, ut ab latrociniis cobibeat eos, qui nullam aliam artem quaerendi wictus babent. (Mori Utopia, edit. Glass. 1750. pag. 21.)—Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen perunia surtum, baud morte, mulcia-

j Utop. pag. 42. k ch. 22.

all the remonstrances of speculative politicians and moralists. the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Puffendorf', together with fir Matthew Hale m, are of opinion that this must always be referred to the prudence of the legislature; who are to judge, fay they, when crimes are become fo enormous as to require fuch fanguinary restrictions n. Yet both these writers agree, that fuch punishment should be cautiously inflicted, and never without the utmost necessity.

Our antient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem, his life by a pecuniary ranfom; as, among their ancestors the Germans, by a stated number of cattle o. But in the ninth year of Henry the first, this power of redemption was taken away, and all persons guilty of larciny above the value of twelvepence were directed to be hanged; which law continues in force to this day P. For though the inferior species of theft, or petit larciny, is only punished by imprisonment or whipping at common law, or by statute 4 Geo. I. c. 11. may be extended to transportation for feven years, as is also expressly directed in the case of the plate-glass company, yet the punishment of grand larciny, or the stealing above the value of twelvepence, (which fum was the standard in the time of king Athelstan, eight hundred years ago) is at common law regularly death. Which, confidering the great intermediate alteration's in the price of denomination of money, is undoubtedly a very rigorous constitution; and made fir Henry Spelman (above a century fince, when money was at twice it's prefent rate) complain, that while every thing elfe was rifen in it's nominal value, and become dearer, the life of man had continually

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<sup>1</sup> L. of N. b. 8. c. 3.

m 1 Hal. P. C. 13.

n See pag. 9.

o Tac. de mor. Germ. c. 12.

P 1 Hal. P. C. 12. 3 Inft. 53.

<sup>9 3</sup> Inft. 218.

<sup>1</sup> Stat. 13 Geo. III. c. 38.

stated value at the exchequer, of a paflure fed ox was one shilling : (Dial. de Scace. 1. 1. §. 7.) which if we should even suppose to mean the folidus legalis mentioned by Lyndewode (Prov. 1. 3. c. 13. See Vol. II. page 509.) or the 72d part of a pound of gold, is only equal In the reign of king Henry I, the to 13:. 4d. of the present standard.

It is true, that the mercy of juries will grown cheaper t. often make them strain a point, and bring in lareiny to be under the value of twelvepence, when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the prefent nominal value of money to the antient standard ", is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larciny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. And in many cases of fimple larciny the benefit of clergy is taken away by ftatute: as from horsestealing in the principals, and acceffories both before and after the fact w; theft by great and notorious thieves in Northumberland and Cumberland x; taking woollen cloth from off the tenters, or linens, fustians, callicoes, or cotton goods, from the place of manufacture2; (which extends, in the last case, to aiders, affisters, procurers, buyers, and receivers) feloniously driving away, or otherwise flealing one or more sheep or other cattle specified in the acts, or killing them with intent to steal the whole or any part of the carcase a, or aiding or affisting therein; thefts on navigable rivers above the value of forty shillings b, or being present, aiding, and affisting thereat; plundering vessels in

t Gloff. 350.

u 2 Inft. 189.

w Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.

x Stat. 18 Car. II. c. 3.

y Stat. 22 Car. II. c. 5. But, as it fometimes is difficult to prove the identity of the goods so stolen, the onus probandi with respect to innocence is now by statute 15 Geo. II. c. 27. thrown on the persons in whose custody such goods are found: the failure whereof is, for the first time, a misdemessnor punishable by forseiture of the treble value; for the second, by imprisonment

alfo; and the third time it becomes a felony, punished with transportation for feven years.

z Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender; for life in the first case, for seven years in the second, and for fourteen years in the third;—in the first and third cases instead of sentence of death, in the second after sentence is given.

a Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See vol. I. pag. 88.

b Stat. 24 Geo. II. c. 45.

diftress, or that have suffered shipwreck c; stealing letters fent by the post d; and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham black act . Which additional feverity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preferve those goods, which are so easily carried off. Upon which last principle the Roman law punished more feverely than other thieves the abigei, or stealers of cattle ; and the balnearii, or fuch as stole the cloaths of persons who were washing in the public baths g; both which constitutions feem to be borrowed from the laws of Athens h. And fo too the antient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field: fuch kind of property (which no human industry can fufficiently guard) being esteemed under the peculiar custody of heaven i. And thus much for the offence of fimtle larciny.

Mixed, or compound larging is fuch as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's house or person. First therefore of larging from the house, and then of larging from the person.

1. LARCINY from the house, though it feems (from the considerations mentioned in the preceding chapters) to have a higher degree of guilt than simple larciny, yet is not at all distinguished from the other at common law \*: unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, viz. that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer, who hath shewn them to have gradually arisen from our improvements in trade and opulence)

h Pott. Antiq. b. 1. c. 26.

i Stiernh. de jur Goth. l. 3. c. 5.

<sup>&</sup>lt;sup>c</sup> Stat. 12 Ann. ft. 2. c. 18. 26 Geo. II. c. 19.

d Stat. 7 Geo. III. c. 50.

e Stat. 9 Geo. I. c. 22.

f Ff. 47. t. 14. 8 Ibid. t. 17.

j See pag. 223. k 1 Hawk. P. C. 98.

<sup>1</sup> Barr. 375, &c.

the benefit of clergy is taken from larcinies committed in an house in almost every instance; except that larciny of the ftock or utenfils of the plate-glass company from any of their houses, &c. is made only fingle felony, and liable to transportation for feven years m. The multiplicity of the general acts is apt to create fome confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larciny; viz. First, in larcinies above the value of twelvepence, committed, 1. In a church or chapel, with or without violence, or breaking the fame n: 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the fame; the owner or fome of his family being therein o: 3. By robbing a dwelling-house in the day time (which robbing implies a breaking) any person being therein P: 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear q: which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded from his clergy. Secondly, in larcinies to the value of five shillings, committed, 1. By breaking any dwelling-house, or any outhouse, shop, or warehouse thereunto belonging, in the day time, although no perfon be therein ; which also now extends to aiders, abettors, and accessories before the facts: 2. By privately stealing goods, wares, or merchandize in any shop, warehouse t, coachhouse or stable, by day or by night; though the same be not broken open, and though no person be therein ": which likewise extends to fuch as affift, hire, or command the offence to be committed. Laftly, in larcinies to the value of forty shillings in a dwelling-house, or its outhouses, although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen v: This also extends to those, who aid or affift in the commission of any such offence.

m Stat. 13 Geo. III. c. 38. n Stat. 23 Hen. VIII. c. 1. 1 Edw.

VI. c. 12, 1 Hal. P. C. 518.

<sup>°</sup> Stat. 5 & 6 Edw. VI. c. 9. 1 Hal. P. C. 522.

<sup>9</sup> Stat. 3 & 4 W. & M. c. 9.

<sup>9</sup> Ibid.

r Stat. 39 Eliz. c. 15.

s Stat. 3 & 4 W. & M. c. 9.

t See Foster, 78. Barr. 379.

u Stat. 10 & 11 W. III. c. 23.

y Stat. 12 Ann. ftat. 1. c. 7.

<sup>2.</sup> LARCINY

2. LARCINY from the person is either by privately stealing; or by open and violent assault, which is usually called robbery.

THE offence of privately stealing from a man's person, as by picking his pocket or the like, privily without his knowlege, was debarred of the benefit of clergy, fo early as by the statute 8 Eliz. c. 4. But then it must be such a larciny, as stands in need of the benefit of clergy, viz. of above the value of twelvepence; else the offender shall not have judg-For the statute creates no new offence; ment of death. but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law w. This feverity (for a most fevere law it certainly is) feems to be owing to the eafe with which fuch offences are committed, the difficulty of guarding against them, and the boldness with which they were practifed (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. And therefore the faccularii, or cutpurfes, were more severely punished than common thieves by the Roman and Athenian laws x.

OPEN and violent larciny from the person, or robbery, the rapina of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear y.

1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the fourth's time z: but afterwards it was taken to be only a misdemessar, and punishable with sine and imprisonment; till the

w 1 Hawk. P. C. 98. The like obfervation will certainly hold in the cases of horsestealing, (1 Hal. P. C. 531.) thests in Northumberland and Cumberland, and stealing woollen cloth from the tenters; and possibly in such other sases where it is provided by any statute that simple larciny, under certain circumstances, shall be felony without benesst of clergy.

x Ff. 47. 11. 7. Pott. Antiq. l. 1.

y 1 Hawk. P. C. 95.

z 1 Hal. P. C. 532.

statute 7 Geo. II. c. 21. which makes it a felony (transportable for feven years) unlawfully and maliciously to affault another, with any offensive weapon or instrument; - or by menaces, or by other forcible or violent manner, to demand any money or goods; -with a felonious intent to rob. If the thief, having once taken a purfe, returns it, still it is a robbery: and fo it is, whether the taking be strictly from the person of another, or in his presence only: as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face 2. But if the taking be not either directly from his person, or in his presence, it is no robbery b. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery c. 3. Lastly, the taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law d, " qui vi rapuit, fur improbior effe videtur," This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcinies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent c: neither is it capital, as privately Atealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is fufficient, if laid to be done by violence f. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his confent g. Thus, if a man be knocked down without previous warning, and stripped of his property while fenfeless, though Ariclly he cannot be faid to be put in fear, yet this is un-

Public

a r Hal. P. C. 533.

b Comyns. 478. Stra. 1015.

e 1 Hawk. P. C. 97.

d Ff. 4. 2. 14. 9. 12.

e 1 Hal, P. C. 534.

f Trin. 3 Ann. by all the judges.

<sup>2</sup> Foit. 128.

doubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a selonious robbery. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higler, or other chapman, to sell his wares, and giving him the sull value of them, amounts to so heinous a crime as robbery.

This species of larciny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1. and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery therefore in a distant field, or foot-path, was not punished with death k; but was open to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9. which takes away clergy from both principals and accessories before the sact, in robbery, wheresoever committed:

II. Malicious mischief, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not animo furandi, or with an intent of gaining by another's loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

And, first, by statute 22 Hen. VIII. c. 11. perversely and maliciously to cut down or destroy the powdike, in the sens of Norfolk and Ely, is selony. And in like manner it is by many special statutes, enacted upon the occasions, made selony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of

h 1 Hawk. P. C. 96.

k 1 Hal. P. C. 535.

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parliament. By statute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or stack of corn or grain; or to imprison or carry away any subject, in order to ranfom him, or to make prey or spoil of his person. or goods upon deadly feud or otherwife, in the four northern counties of Northumberland, Westmorland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called blackmail, to fecure fuch goods from rapine; is felony without benefit of clergy. By statute 22 & 23 Car. II. c. 7. maliciously, unlawfully, and willingly, in the night-time, to burn or cause to be burnt or destroyed, any ricks or flacks of corn, hay, or grain, barns, houses, buildings, or kilns; or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years; and to maim or hurt such horses, sheep, or other cattle, is a trespass, for which treble damages shall be recovered. By statute 4 & 5 W. & M. c. 23. to burn on any waste, between Candlemas and Midfummer, any grig, ling, heath, furze, gofs, or fern, is punishable with whipping and confinement in the house of correction. By statute I Ann. st. 2. c. 9. captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of infurers alfo) are guilty of felony without benefit of clergy. And by statute 12 Ann. st. 2. c. 18. making any hole in a ship in distress, or stealing her pumps, or aiding or abetting fuch offence, or wilfully doing any thing tending to the immediate loss of fuch ship, is felony without benefit of clergy. By statute 1 Geo. I. c. 48. maliciously to set on fire any underwood, wood, or coppice, is made fingle felony. By ftatute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or cloaths of any person passing in the streets or highways, with intent fo to do, is felony. This was occasioned by the insolence of certain weavers and others: who, upon the introduction of fome Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting aqua fortis in the Areets

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streets upon such as wore them. By statute 9 Geo. I. c. 22. commonly called the Waltham black-act, occasioned by the devastations committed near Waltham in Hampshire, by perfons in disguise or with their faces blacked; (who seem to have refembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotland 1;) by this black act, I fay, which has in part been mentioned under the feveral heads of riots, menaces, mayhem, and larciny m, it is farther enacted, that to fet fire to any house, barn or outhouse, (which is extended by statute 9 Geo. III. c. 29. to the malicious and wilful burning or fetting fire to all kinds of mills) or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or unlawfully and maliciously to break down the head of any fishpond, whereby the fish shall be loft or destroyed; or in like manner to kill, maim, or wound any cattle; or cut down or destroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts, or procuring by gift or promife of reward any person to join them therein, are felonies, without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner by the Roman law, to cut down trees; and especially vines, was punished in the fame degree as robbery ". By statutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is also made felony without the benefit of clergy, maliciously to cut down any river or feabank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal. By statute II Geo. II. c. 22. to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or seaport; or to use any outrage with such intent; or to scatter, take away, spoil, or damage such grain or meal; is punished for the first offence with imprisonment and public

<sup>1 3</sup> Inst. 197. n Ff. 47. 7. 2.

m See pag. 144. 208. 235. 240.

whipping: and the fecond offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat or vessel intended for exportation, is felony, subject to transportation for feven years. By statute 28 Geo. II. c. 10. to fet fire to any gofs, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. By statutes 6 Geo. III. c. 36 and 48. and 13 Geo. III. c. 33. wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third, if in the day time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. By statute 9 Geo. III. c. 29. wilfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, is made fingle felony, and punishable with transportation for seven years, in the offender, his advifers, and procurers. And by statute 13 Geo. III. c. 38. the like punishment is inflicted on such as break into any house, &c. belonging to the plate-glass company with intent to steal, cut, or destroy, any of their stock or utenfils, or fhall wilfully and malicicusly cut or destroy the same. And these are the principal punishments of malicious mischief (m).

III. For-

<sup>(</sup>m) [ And by statute 22 Geo. III. c. 40. if any person shall by day or by night break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge or other woollen goods in the loom, or any tools employed in making thereof, or any velvet, wrought filk, or filk mixed with any other materials, or other filk manufacture in the loom, or any warp or shute, tools, tackle, or utenfils, or any linen or cotton, or linen and cotton mixed with any other marials, or other linen or cotton manufactures in the loom, or any warp, shute, tools, tackle, and utenfils; or shall wilfully and maliciously cut or destroy any fuch ferges or woollen goods in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any fuch serges or other woollen goods are hanged in order to dry; or shall wilfully and maliciously cut or destroy any velvet, wrought filk, or filk mixed with any other materials, or other filk manufacture in the loom, or any warp, shute, tools, tackle, or utenfils prepared or employed in or for the making thereof, or any linen or cotton, or linen or cotton mixed with any other materials, or other linen and cotton manufacture in the loom, or any warp or shute, tools, tackle and utenfils prepared for or employed in the making thereof, or shall wilfully and maliciously break or destroy any tools used

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III. Forgery, or the crimen false, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death. It may with us be defined (at common law) to be, "the fraudulent making or alteration of a writing to the prejudice of another man's "right:" for which the offender may suffer sine, imprisonment, and pillory. And also, by a variety of statutes, a more severe punishment is inslicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

By statute 5 Eliz. c. 14. to forge or make, or knowingly to publish or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; by forseiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forseiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence in both cases being selony without benefit of clergy.

Besides this general act, a multitude of others, fince the revolution (when paper credit was first established) have inslicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities p: of bills of credit issued from the exche-

O I.ft. 4. 18. 7. II Geo. I. c. 9. 12 Geo. I. c. 32, P Stat. 8 & 9 W. III. c. 20. §. 36. 15 Geo. II. c. 13. 13 Geo. III. c. 79.

in the making any fuch ferges or other woollen goods, or any tools used in the weaving or making of any fuch velvet, &c. or any tools used in and for the carding, spinning, weaving, preparing or making any such linen or cotton, not having the consent of the owner so to do, shall be guilty of felony without benefit of clergy.]

quer q; of fouth fea bonds, &c. r; of lottery tickets or orders \*; of army or navy debentures t; of East India bonds "; of writings under feal of the London, or royal exchange affurance w; of the hand of the receiver of the pre-fines x, or of the accountant-general and certain other officers of the court of chancery, of a letter of attorney or other power to receive or transfer flock or annuities; and on the perfonating a proprietor thereof, to receive or transfer such annuities, stock, or dividends 2: also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath in order to obtain a probate, or letters of administration, in order to receive such payments; and the forging, or procuring to be forged, and likewise the uttering or publishing, as true, of any counterfeited seaman's will or power 2: to which may be added, though not strictly reducible to this head, the counterfeiting of mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary's; the forging or imitating of any stamps to defraud the public revenue; and the forging of any marriage register or licence d: all which are by diftinct acts of parliament made felonies without benefit of clergy. By statutes 13 Geo. III. c. 52 & 59. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punished with transportation for fourteen years (n). By statute 12 Geo. III. c. 48. certain frauds

q See the feveral acts for iffuing them.

r Stat. 9 Ann. c. 21. 6 Geo. I. c. 4. & 11. 12 Geo. I. c. 32.

s See the several acts for the lotteries.

<sup>\*</sup> Stat. 5 Geo. I. c. 14.9 Geo I. c. 5.

u Stat. 12 Geo. I. c. 32.

w Stat. 6 Geo. I. c. 18.

x Stat. 32 Geo. II. c. 14.

y Stat. 12 Geo. I. c. 32.

<sup>2</sup> Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22. §. 77.

<sup>\*</sup> Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.

b Stat. 4 Geo. II. c. 18.

c See the feveral stamp acts.

d Stat. 26 Geo. II. c. 33.

<sup>(</sup>n) [And by statute 24 Geo. III. sess. 2. c. 53. any person who shall counterfeit any stamp to be used in pursuance of that act, for the making of gold or silver plate, or shall stamp any wrought plate with any counterfeit

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frauds on the stamp-duties, therein described, principally by using the same stamps more than once, are made single selony, and liable to transportation for seven years. And the same punishment is inslicted by statute 13 Geo. HI. c. 38. on such as counterseit the common seal of the corporation for manufacturing plate-glass, (thereby erected) or knowingly demand money of the company by virtue of any writing under such counterseit seal (0).

THERE are also certain other general laws, with regard to forgery; of which the first is 2 Geo. II. c. 25. whereby the first offence in forging or procuring to be forged, acting or affifting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorfement or affignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, (or corporation<sup>e</sup>) is made felony without benefit of clergy. And by statutes 7 Geo. II. c. 22. and 18 Geo. III. c. 18. it is equally penal to forge or cause to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal fum of any accountable receipt for any note, bill, or any other fecurity for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case posfible to be conceived, wherein forgery, that tends to defraud,

e Stat. 31 Geo. II. c. 22. §. 78.

terfeit stamp, or shall remove from one piece of wrought plate to another any stamp, or shall sell or export any plate, &c. with such counterfeit stamp thereon, shall be guilty of felony without benefit of clergy.]

<sup>(</sup>o) [And by statute 24 Geo. III. sess. 2. c. 37. if any person shall forge the hand-writing of any person, in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, or shall forge the date upon the superscription of any letter, or shall write and send by the post any letter or packet, the superscription or cover whereof shall be forged, or the date upon such cover altered in order to avoid payment of the duty of postage, knowing the same to be forged, he shall be guilty of felony, and shall be transported for seven years.]

whether in the name of a real or fictitious person, is not made a capital crime.

These are the principal infringements of the rights of property; which were the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences, of publicly pernicious consequences, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemessnors, with the punishment annexed to each, that are cognizable by the laws of England.

f Foft, 116, &c.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

W E are now arrived at the fifth general branch or head, under which I proposed to consider the subject of this bock of our commentaries; viz. the means of preventing the commission of crimes and misdemessors. And really it is an honour, and almost a singular one, to our English laws, that they surnish a title of this fort: since preventive justice is upon every principle of reason, of humanity, and of sound policy, preserable in all respects to punishing justice a; the execution of which, though necessary, and in it's consequence a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inslicted upon such as have been guilty of certain gross misdemesnors: but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And indeed, if we consider all human

2 Beccar. ch. 41.

punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter b. all punishments inflicted by temporal laws may be classed under three heads; fuch as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the fame end, of preventing future crimes, whether that be effected by amendment, difability, or example. But the caution, which we speak of at present, is fuch as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable fuspicion, that some crime is intended or likely to happen; and confequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon conflitution these sure always at hand, by means of king Alfred's wise institution of decennaries or frankpledges; wherein, as has more than once been observed to the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their suture conduct: of which we find mention in the laws of king Edward the confessor the suspection of the sum of king Edward the confessor that such as therefore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

nore fureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer: whereby the parties acknowlege themselves to be indebted to the crown in the sum required, (for instance 1001) with condition to be void and of none effect, if the

b See pag. 11.

c See Vol. I. pag. 114.

d cap. 18.

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party shall appear in court on such a day, and in the mean time shall keep the peace; either generally, towards the king, and all his liege people; or particularly also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour) either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next fessions, in pursuance of the statute 3 Hen. VII. c. 1. and if the condition of fuch recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and, being estreated or extracted (taken out from among the other records) and fent up to the exchequer, the party and his fureties having now become the king's absolute debtors, are fued for the feveral fums in which they are respectively bound.

2. Any justices of the peace, by virtue of their commisfion, or those who are ex officio conservators of the peace, as was mentioned in a former volume e, may demand fuch fecurity according to their own discretion; or it may be granted at the request of any subject, upon due cause shewn, provided fuch demandant be under the king's protection; for which reason it has been formerly doubted, whether jews, pagans, or persons convicted of a praemunire, were entitled thereto f. Or, if the justice is averse to act, it may be granted by a mandatory writ, called a fupplicavit, iffuing out of the court of king's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and feal \$. But this writ is feldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And indeed a peer or peeress cannot be bound over in any other place, than the courts of

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e See Vol. I. pag. 350.

g F. N. B. 8c. 2 P. Wms. 202.

<sup>1</sup> Hawk. P. C. 126.

king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being compose mentis and under the degree of nobility, whether he be a sellow justice or other magistrate, or whether he be merely a private man h. Wives may demand it against their husbands; or husbands, if necessary, against their wives i. But seme-coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowlegements.

3. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assistes, or king's bench) if they see sufficient cause: or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

Thus far what has been faid is applicable to both species of recognizances, for the peace, and for the good behaviour; de pace, et legalitate, tuenda, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, of the means of forseiting them, I shall now consider them separately: and sirst, shall shew for what cause such a recognizance, with sureties for the peace, is grantable; and then, how it may be forseited.

1. Any justice of the peace may, ex officio, bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons

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h 1 Hawk. P. C. 127. i 2 Stra. 1207.

j 1 Hawk. P. C. 129.

or attendance, to the terror of the people; and all fuch as he knows to be common barretors; and fuch as are brought before him by the constable for a breach of the peace in his presence; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizancesk. Also, wherever any private man hath just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others fo to do; he may demand furety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such furety out of malice or for mere vexation 1. This is called fwearing the peace against another: and, if the party does not find fuch fureties, as the justice in his discretion shall require, he may immediately be committed till he does ".

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an affault, or menace, to the person of him who demanded it, if it be a special recognizance: or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book: or, by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked)

k 1 Hawk. P. C. 126. 1 Ibid. 127.

m Ibid. 128. n Ibid. 131.

upon to be merely the effect of unmeaning heat and passion) unless they amount to a challenge to fight.

THE other species of recognizance, with sureties, is for the good abearance, or good behaviour. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. First then, the justices are empowered by the statute 34 Edw. III. c. 1. to bind over to the good behaviour towards the king and his people, all them that be not of good fame, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, that be not of good fame, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem; as, for haunting bawdy-houses with women of bad fame; or for keeping fuch women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; fuch as keep fuspicious company, or are reported to be pilferers or robbers; fuch as fleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good same: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of fureties, he must express the cause thereof with convenient certainty; and take care that fuch cause be a good one P.

2. A RECOGNIZANCE for the good behaviour may be forfeited by all the fame means, as one for the fecurity of the
peace may be; and also by some others. As, by going armed
with unusual attendance, to the terror of the people; by
speaking words tending to sedition; or, by committing any
of those acts of misbehaviour, which the recognizance was
intended to prevent. But not by barely giving fresh cause
of suspicion of that which perhaps may never actually happen q: for, though it is just to compel suspected persons to
give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

9 1 Hawk. P. C. 133.

## CHAPTER THE NINETEENTH.

## OF COURTS OF A CRIMINAL JURISDICTION.

THE fixth, and last, object of our inquiries will be the method of inflicting those punishments, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method that I sollowed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several courts of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several proceedings therein.

FIRST, then, in reckoning up the feveral courts of criminal jurifdiction, I shall, as in the former case, begin with an account of such, as are of a public and general jurisdiction throughout the whole realm; and, afterwards, proceed to such, as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

I. In our inquiries into the criminal courts of public and general jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of

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the most extensive powers. But as it is contrary to the genius and spirit of the law of England, to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other: at least so far, as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the sace of the record; though sometimes causes may be removed from one to the other before trial. And therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; viz.

1. THE high court of parliament; which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made pro re nata, and by no means an execution of fuch as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a profecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurifdiction by the most folemn grand inquest of the whole kingdom a. A commoner cannot however be impeached before the lords for any capital offence, but only for high misdemesnors b: a peer may be impeached for any

plice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to

a 1 Hal. P. C. \* 150.

b When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment against Simon de Bereferd, who had been a notorious accom-

crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king c; but it hath of late years been strenuously maintained d, that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are in cases of mildemesnors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who in their great councils fometimes tried capital accufations relating to the public: " licet apud confilium accufare quoque, et discrimen capitis intendere "." And it has a peculiar propriety in the English constitution; which has much improved upon the antient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be most carefully avoided f, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of fuch crimes, as the ordinary magistrate either

judge him as a peer of the land. And "of the land have power to do this, but when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered in the parliament-roll. " And it is affented " and accorded by our lord the king, " and all the great men, in full parliaer ment, that albeit the peers, as judges of the parliament, have taken upon " them in the presence of our lord the " king to make and render the faid judg-" ment; yet the peers who now are, or " fhall be in time to come, be not bound or charged to render judgment upon

66 others than peers; nor that the peers

" thereof ought ever to be discharged " and acquitted; and that the aforefaid " judgment now rendered be not drawn " to example or confequence in time to " come, whereby the faid peers may be " charged hereafter to judge others than " their peers, contrary to the laws of the " land, if the like cafe happen, which " God forbid." ( Rot. Parl. 4 Edw. Ill. n. 2 & 6. 2 Brad. Hift. 190. Selden. judic. in parl. ch. 1.)

c 1 Hal. P. C. 350.

d Lords Journ. 12 May 1679. Com-Journ. 15 May 1679. Fost. 142, &c.

e Tacit. de mor. Germ. 12. f See Vol. I. pag. 269.

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dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge; because their constituents are the parties injured: and can therefore only impeach. But before what court shall this impeachment be tried? Not before the ordinary tribunals. which would naturally be fwayed by the authority of fo powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring it's charge before the other branch, which confifts of the nobility, who have neither the fame interests, nor the fame passions as popular affemblies g. This is a vast fuperiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the fame time both judges and accufers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to infure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very fingular nature, which was infifted on by the house of commons in the case of the earl of Danby in the reign of Charles II h; and it is now enacted by flatute 12 & 13 W. III. c. 2. that no pardon under the great feal shall be pleadable to an impeachment by the commons of Great Britain in parliament i.

2. The court of the lord high fleward of Great Britain is a court instituted for the trial of peers, indicted for treason or selony, or for misprission of either. The office of this great magistrate is very antient; and was formerly hereditary, or at least held for life, or dum bene se gesserit: but now it is usually, and hath been for many centuries past m, granted pro hac vice only; and it hath been the constant practice (and therefore seems now to have become necessary) to grant

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g Montesc. Sp. L. xi. 6.

h Com. Journ. 5 May 1679.

i See ch. 31.

<sup>4</sup> Ind. 58. 2 Hawk. P. C. 5. 421.

<sup>2</sup> Jon. 54.

<sup>1 1</sup> Bulftr. 198.

m Pryn. on 4 Inft. 46.

it to a lord of parliament, else he is incapable to try fuch delinquent peer ". When fuch an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the affifes before the justices of over and terminer, it is to be removed by a writ of certiorari into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving fuch plea. But he may not plead, in that inferior court, any other plea; as guilty, or not guilty, of the indictment: but only in this court: because, in consequence of fuch plea, it is possible that judgment of death might'be awarded against him. The king therefore, in case a peer be indicted for treason, felony, or misprisson, creates a lord high steward pro hac vice by commission under the great seal; which recites the indictment fo found, and gives his grace power to receive and try it fecundum legem et confuetudinem Angliae. Then, when the indictment is regularly removed, by writ of certiorari, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a ferjeant at arms, to fummon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, felected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to fummon as many as he thought proper, (but of late years not less than twenty-three o) and that those lords only should fit upon the trial: which threw a monstrous weight of power into the hands of the crown, and this it's great officer, of felecting only fuch peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into difgrace with Charles II,

n Quand un seigneur de parlement pur faire venir xx seigneurs, ou xviii, 59. 2 Hawk. P. C. 5. Barr. 234. o Kelynge. 56.

ferra arrein de treafon ou felony, le roy par &c. (Yearb. 13 Hen. VIII. 11.) See es lettres patents fera un grand et Sage Staundf. P. C. 152. 3 Inft. 28. 4 Inft. seigneur d'estre le grand senejchal d'Angleterre : qui-deit faire un precept-

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there was a defign formed to prorogue the parliament, in order to try him by a felect number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court p. But now, by statute 7 W. III. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery.

During the fession of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the king in parliament q. It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker pro tempore, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the fole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, fo he has no right to intermix with them in giving any vote upon the trial r. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges s, that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during it's fitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

P Carte's life of Ormonde. Vol. II. State Trials, Vol. IV. 214. 232, 3.

IT has been a point of some controversy, whether the bishops have now a right to fit in the court of the lord high fleward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, " all peers, who have a right to fit and vote in parliament:" but the expression had been much clearer, if it had been, " all lords," and not, " all " peers;" for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not univerfally allowed to be peers with the temporal nobility: and perhaps this word might be inferted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly excufed, rather than excluded, from fitting and voting in trials, when they come to concern life or limb: " episcopi, seut « caeteri barones, debent interesse judiciis cum baronibus, quousque es perveniatur ad diminutionem membrorum, vel ad mortem?" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law) but of the general rule, that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case t, which hath ever fince been adhered to, is confonant to these constitutions; " that the colords spiritual have a right to stay and sit in court in capi-" tal cases, till the court proceeds to the vote of guilty, or " not guilty." It must be noted, that this resolution extends only to trials in full parliament: for to the court of the lord high steward (in which no vote can be given, but merely that of guilty, or not guilty) no bishop, as such, ever was or could be fummoned; and though the statute of king William

regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter it's constitution; and consequently does not give the lords fpiritual any right in cases of blood which they had not before". And what makes their exclusion more reasonable, is, that they have no right to be tried themselves in the court of the lord high steward w, and therefore furely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a feat in the house; as appears from the trials of popish lords, of lords under age, and (fince the union) of the Scots nobility, though not in the number of the fixteen; and from the trials of females, fuch as the queen confort or dowager, and of all peereffes by birth; and peereffes by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their fecond husband.

3. THE court of king's bench x, concerning the nature of which we partly inquired in the preceding book y, was (we may remember) divided into a crown fide, and a plea fide. And on the crown fide, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemessnor or breach of the peace. Into this court' also indictments from all inferior courts may be removed by writ of certiorari, and tried either at bar, or at nise prius, by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the fickness in 1665) all former commissions of over and terminer, and general gaol delivery, are at once absorbed and determined ip/o facto: in the fame manner as by the old Gothic and Saxon constitu-

u Foft. 248.

W Bro. Abr. t. Trial. 142.

<sup>\* 4</sup> Inft. 70. 2 Hal. P. C. 2. 2 Hawk.

y See Vol. III. pag. 41.

tions, " jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege 2 (p)."

Into this court of king's bench hath reverted all that was good and falutary of the jurisdiction of the court of farchamber, camera fiellata?: which was a court of very antient original,

Z Stiernhook. l. t. c. 2.

This is faid (Lamb. Arch. 154.) to have been so called, either from the Saxon word reonan to feer or govern ;or from it's punishing the crimen stelliomatus, or cosenage; -or because the room wherein it sate, the old council chamber of the palace of Westminster, (Lamb. 148.) which is now converted into the lottery-office, and forms the eastern fide of new palace-yard, was full of windows ;-or (to which fir Edward Coke, 4 Inft. 66. accedes) because baply the roof thereof was at the first garnished with gilded flars. As all these are merely conjectures, (for no flars are now in the roof, nor any are faid to have remained there so late as the reign of queen Elizabeth) it may be allowable to propose another conjectural etymology, as plaufible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward I, their contracts and obligations were denominated in our antient records ftarra or ftarrs, from a corruption

of the Hebrew word, shetar, a covenant. (Tovey's Angl. judaic. 32. Selden. tit. of hon. ii. 34. Uxor. Ebraic. i. 14.) These flarrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster: and no starr was allowed to be valid, unless it were found in some of the faid repositories. (Memorand, in Scace' P. 6 Edw. I. prefixed to May. nard's year-book of Edw. II. fol. 8. Madox hift. exch. c. vii. §. 4, 5, 6.] The room at the exchequer, where the chests containing these starts were kept, was probably called the flarr-chamber; and, when the Jews were expelled the kingdom, was applied to the use of the king's council, fitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is faid to have been fituated near the receipt of the exchequer at Westmin-

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(p) [But this is now altered with respect to the session of gaol delivery for Middlesex by statute 25 Geo. III. c. 18. which enacts that when any session of over and terminer and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall have been begun to be holden before the essoin day of any term, that the same session shall be continued to be holden, and the business thereof sinally concluded, notwithstanding the happening of such essoin day of any term, or the sitting of his majesty's court of king's bench at Westminster, or essewhere in the county of Middlesex; and that all trials, &c. had at such session so continued to be holden, shall be good and essectual to all intents and purposes.]

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original b, but new-modelled by statutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. confifting of divers lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemesinors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us c) ftretched " to " the afferting of all proclamations, and orders of state: to " the vindicating of illegal commissions, and grants of mo-" nopolies; holding for honourable that which pleafed, and " for just that which profited, and becoming both a court " of law to determine civil rights, and a court of revenue to " enrich the treasury: the council table by proclamations " enjoining to the people that which was not enjoined by " the laws, and prohibiting that which was not prohibited; " and the star-chamber, which confisted of the same persons " in different rooms, cenfuring the breach and disobedience " to those proclamations by very great fines, imprisonments, " and corporal feverities: fo that any difrespect to any acts " of state, or to the persons of statesmen, was in no time " more penal, and the foundations of right never more in " danger to be destroyed." For which reasons it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nation d.

Westminster: (the king's council, his chancellor, treasurer, justices, and other sages, were assembled en la chambre des stilles pres la resceipt al Westminster.—Claus. 41 Edav. III. m. 13.) For in process of time, when the meaning of the Jewish starrs was forgotten, the word star-chamber was naturally rendered in law-french, la chaumbre des esteilles, and in law-latin camera stellata; which continued to be the stille in latin till the dissolution of that court.

b Lamb. Arch. 156.

c Hist. of reb. book 1 & 3.

d The just odium into which this tribunal had fallen before it's diffolution, has been the occasion that few memorials have reached us of it's nature, jurisdiction, and practice; except such

as, on account of their enormous oppression, are recorded in the histories of the times. There are however to be met with some reports of it's proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manufcript; of which the author hath two; one from 40 Eliz. to 13 Jac. I. the other for the first three years of king Charles: and there is in the British Museum (Harl. MSS. Vol. I. no. 1226) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all it's process, may also be found in 18 Rym. Foed. 192, &c.

VOL. IV.

4. THE

- 4. THE court of chivalry , of which we also formerly fpoke f as a military court, or court of honour, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of it's authority, is fallen into entire difuse; there having been no permanent high constable of England (but only pro hac vice at coronations and the like) fince the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a subject: fo ample, that when the chief justice Fineux was asked by king Henry the eighth, how far they extended, he declined answering: and faid, the decision of that question belonged to the law of arms, and not to the law of England s.
- 5. THE high court of admiralty h, held before the lord high admiral of England, or his deputy, stiled the judge of the admiralty, is not only a court of civil, but also of criminal, jurisdiction. This court hath cognizance of all crimes and offences committed either upon the fea, or on the coasts, out of the body or extent of any English county; and, by flatute 15 Ric. II. c. 3. of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the fame rivers, which are then a fort of ports or havens; fuch as are the ports of London and Glocester, though they lie at a great distance from the fea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of 1 criminal jurisdiction there was contrary to the genius of the law of England; inafmuch as a man might be there deprived of his life by the opinion of a fingle judge, without the judgment of his peers. And befides, as innocent perfons might thus fall a facrifice to the caprice of a fingle man, fo very gross offenders might, and did frequently, escape pu-

e 4 Inft. 123. 2 Hawk. P. C. 9.

<sup>8</sup> Duck de authorit. jur. civ.

<sup>&</sup>amp; See Vol. III. pag. 68.

h 4 Inft. 134. 147.

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nishment: for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation: and therefore in the eighth year of Henry VI it was endeavoured to apply a remedy in parliament: which then miscarried for want of the royal affent. However, by the statute 28 Hen. VIII. c. 15. it was enacted, that these offences should be tried by commissioners of over and terminer, under the king's great feal; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are usually appointed) the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty still presiding therein, as the lord mayor is the prefident of the fession of over and terminer in London.

THESE five courts may be held in any part of the kingdom, and their jurifdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurifdiction, and confined to particular districts. Of which species are

6, 7. The courts of oyer and terminer, and general gaol delivery i: which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book k. We then observed, that, at what is usually called the assiss, the judges sit by virtue of five several authorities: two of which, the commission of assis and its attendant jurisdiction of nise

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<sup>&</sup>lt;sup>1</sup>4 Inft. 162. 168. 2 Hal. P. C. 22. k See Vol. III. pag. 60. 32. 2 Hawk, P. C. 14, 23.

prius, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of feveral statutes, a criminal jurisdiction alfo, in certain special cases!. The third, which is the commission of the peace, was also treated of in a former vo-Jume m, when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the affifes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to affift the judges in fuch matters as lie within their knowlege and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of over and terminer ", to hear and determine all treasons, felonies, and misdemesnors. This is directed to the judges and feveral others, or any two of them; but the judges or ferjeants at law only are of the quorum, fo that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" fo that by virtue of this commission they can only proceed upon an indictment found at the same assises; for they must first inquire, by means of the grand jury or inquest, before they are impowered to hear and determine by the help of the petit jury. Therefore they have besides, sifthly, a commission of general gaol delivery o; which empowers them to try and defiver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomfoever indicted, or for whatever crime committed. It was antiently the course to iffue special writs of gaol delivery for each particular prisoner, which were called the writs de bono et malo P: but these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a conflitution of fingular use and ex-

<sup>&</sup>lt;sup>1</sup> <sub>2</sub> Hal. P. C. <sub>39</sub>. <sub>2</sub> Hawk. P. C. <sub>28</sub>.

n See appendix, § x. o Ibid.

m See Vol. I. pag. 351.

P 2 Inft. 43.

C.

cellence. Sometimes also, upon urgent occasions, the king iffues a special or extraordinary commission of over and terminer, and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same, as upon general and ordinary commissions. Formerly it was held, in purfuance of the statutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commission of over and terminer, or in that of gaol delivery, within his own county, where he was born or inhabited; in like manner as they are prohibited from being judges of affife and determining civil causes. But that local partiality, which the jealoufy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemesnors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. II. c. 27. to allow any man to be a justice of over and terminer and general gaol delivery within any county of England.

8. The court of general quarter fessions of the peace q is a court that must be held in every county, once in every quarter of a year; which by statute 2 Hen. V. c. 4. is appointed to be in the first week after michaelmas-day: the first week after the epiphany; the first week after the close of easter; and in the week after the translation of faint Thomas the martyr, or the feventh of July. It is held before two or more justices of the peace, one of which must be of the quorum. The jurisdiction of this court, by statute 34 Edw. III. c. 1. extends to the trying and determining all felonies and trefpaffes whatfoever: though they feldom, if ever, try any greater offence than fmall felonies within the benefit of clergy; their commission providing, that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of king's bench or common pleas, or one of the judges of affife. And therefore murders, and other capital felonies, are usually remitted for a more solemn

<sup>9 4</sup> Inft. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

trial to the affises. They cannot also try any new-created offence, without express power given them by the statute which creates it r. But there are many offences, and particular matters, which by particular flatutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the fmaller misdemesnors, against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settle. ment and provision for the poor, vagrants, fervants wages apprentices, and popish recufants f. Some of these are proceeded upon by indicament; and others in a fummary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by writ of certiorari facias, and be there either quashed or confirmed. The records or rolls of the fessions are committed to the custody of a special officer denominated the custos rotulorum, who is always a justice of the quorum; and among them of the quorum (faith Lambard's) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the custos rotulorum (who is the principal civil officer in the county, as the lord lieutenant is the chief in military command) is by the king's fign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to fell for money t.

In most corporation towns there are quarter-sessions kept before justices of their own, within their respective limits; which have exactly the same authority as the general quarter sessions of the county, except in a very sew instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is sometimes kept a

fpecial or petty fession, by a few justices, for dispatching smaller business in the neighbourhood between the times of the general fessions; as, for licensing alchouses, passing the accounts of the parish officers, and the like.

9. The sheriff's tourn", or rotation, is a court of record, held twice every year within a month after easter and michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred ": This therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the ease of the sheriff, was taken

10. THE court-leet, or view of frankpledge x, which is a court of record, held once in the year and not oftener, within a particular hundred, lordship, or manor, before the fleward of the leet; being the king's court granted by charter to the lords of those hundreds or manors. It's original intent was to view the frank pledges, that is, the freemen within the liberty; who, (we may remember 2) according to the inflitution of the great Alfred, were all mutually pledges for the good behaviour of each other. Befides this, the prefervation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court-leet and the sheriff's tourn: which have exactly the fame jurifdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy confifts in usually lying there: a regulation, which owes it's original to the laws of king Canute a. But perfons under twelve and above fixty years old, peers, clergymen, women, and the king's tenants in antient demesne, are excused from attendance there: all others being bound to appear upon the jury, if required, and make their due prefentments. It was also antiently the custom to summon all the king's subjects, as

u 4 Inft. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.

w Mirr. c. 1. §. 13 & 16.

<sup>\* 4</sup> Inft. 261. 2 Hawk. P. C. 72.

y Mirror. c. 1. §. 10. 2 See Vol. III. pag. 113.

a part 2. c. 19.

they respectively grew to years of discretion and strength, to come to the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to prefent by jury all crimes whatfoever that happened within their jurisdiction; and not only to prefent, but also to punish, all trivial misdemesnors, as all trivial debts were recoverable in the court-baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our antient con-Thus in the Gothic constitution, the baereds, flitution. which answered to our court-leet, " de omnibus quidem cog-" noscit, non tamen de omnibus judicat "." The objects of their jurisdiction are therefore unavoidably very numerous: being fuch as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nusances and other material offences against the king's peace and public trade, down to eavesdropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the difcharge granted by the statute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon these courts; which occasioned them to grow into difrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter fessions: which it is particularly directed to do in some cases by statute 1 Ed. IV. c. 2.

11. THE court of the coroners c is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do super visum corporis. Of the coroner and his office we treated at large in a former volume d, among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

b Stiernh. de jur. Gotb. 1. 1. c. 2. 2 Hawk. P. C. 42.

c 4 Inft. 271. 2 Hal, P. C. 53. d See Vol. I. pag. 349.

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12. THE court of the clerk of the market e is incident to every fair and market in the kingdom, to punish misdemesnors therein; as a court of pie poudre is, to determine all disputes relating to private or civil property. The object of this jurisdiction f is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though now usually a layman, is called the clerk of the market g. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of it's coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles.

II. There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemessors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclefiaftical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, pro salute animae; or, which is looked upon as equivalent to all the rest, by a sum of mo-

e 4 Inst. 273.

f See stat. 17 Car. II. c. 19.

22 Car. II. c. 8. 23 Car. II. c. 12.

2 Bacon of English Gov. b. 1. c. 8.

ney to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book h. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

- 1. And, first, the court of the lord steward, treasurer, or comptroller of the king's houshold, was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the checque roll of the houshold, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men, (that is, sober and discreet persons) of the king's houshold.
- 2. THE court of the lord fleward of the king's housbold, or (in his absence) of the treasurer, comptroller, and steward of the marfhalfea k, was erected by flatute 33 Hen. VIII. c. 12. with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be fhed in, or within the limits, (that is, within two hundred feet from the gate) of any of the palaces and houses of the king or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and petit one, as at common law, taken out of the officers and fworn fervants of the king's houshold. The form and folemnity of the process, particularly with regard to the execution of the fentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely fet forth in the faid statute 33 Hen. VIII. and the several officers of the fervants of the houshold in and about fuch execution are

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h See Vol. III. pag. 61.

i 4 Inft. 133.

k Ibid. 2 Hal. P. C. 7.

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described; from the serjeant of the wood-yard, who furnishes the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.

3. As in the preceding book 1 we mentioned the courts of the two universities, or their chancellor's courts, for the redrefs of civil injuries; it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a fimilar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemesnors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason. felony, and mayhem, by a particular charter is committed to the univerfity jurisdiction in another court, namely, the court of the lord high steward of the university.

For by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, selony, and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found

at the affifes, or elfewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of affife: and then it comes to be tried in the high steward's But the indictment must first be found by a grand jury, and then the cognizance claimed: for I take it that the high steward cannot proceed originally ad inquirendum; but only, after inquest in the common law courts, ad audien-Much in the same manner, as, dum et determinandum. when a peer is to be tried in the court of the lord high fleward of Great Britain, the indictment must first be found at the affifes, or in the court of king's bench, and then (in configuence of a writ of certiorari ) transmitted to be finally heard and determined before his grace the lord high fleward and the peers.

WHEN the cognizance is so allowed, if the offence be inter minora crimina, or a misdemessior only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this. The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the university, who thereupon return a panel of eighteen matriculated laymen, " laicos privilegio universitatis gaudentes:" and by a jury formed de medietate, half of freeholders and half of matriculated persons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process; to which he is annually bound by an oath.

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I HAVE been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever be thought adviseable to revive them: though it is not a right that merely rests in scriptis or theory, but has formerly often been carried into execution. There are many instances, one in the reign of queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor at the assistes, and afterwards tried before the high steward by jury. The commissions under the great seal, the sherist's and bedell's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

#### CHAPTER THE TWENTIETH.

## OF SUMMARY CONVICTIONS.

E are next, according to the plan I have laid down, totake into confideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; summary, and regular: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

By a fummary proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute of-

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fence. But it has of late been fo far extended, as if a check be not timely given, to threaten the difuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. Or this fummary nature are all trials of offences and frauds contrary to the laws of the excise, and other branches of the revenue: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the difcretion of the crown. And though fuch convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent profecutions by action or indictment; and though fuch has usually been the conduct of the commissioners, as feldom (if ever) to afford just grounds to complain of oppression; yet when we again a consider the various and almost innumerable branches of this revenue; which may be in their turns the fubjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height.

II. Another branch of fummary proceedings is that before justices of the peace, in order to inslict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited b, and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath however had some mischievous effects; as, I. The almost entire disuse and contempt of the court-leet, and sherisf's tourn, the king's antient courts of common law, formerly much revered and respected.

<sup>2</sup> See Vol. 1. pag. 319, &c.

b Lambard and Burn.

2. The burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehenfion that the duty of their office would take up too much of that time, which they are unwilling to spare from the necesfary concerns of their families, the improvement of their understandings, and their engagements in other fervices of the public. Though if all gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the lefs heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection fo formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of fummary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be profittuted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent forefight of our antient lawgivers, who fuffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our antient constitution, by ordaining new penalties to be inflicted upon fummary convictions.

The process of these summary convictions, it must be owned, is extremly speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned.

demned. This is now held to be an indispensible requisite c: though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

- " Qui ftatuit aliquid, parte inaudita altera,
- " Aequum licet statuerit, haud aequus fuit."

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never fuffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this fummons, the magistrate, in fummary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually iffues his warrant, either to apprehend the offender. in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by diffrefs and fale of his goods. This is, in general, the method of fummary proceedings before a justice or justices of the peace: but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment: and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of fummary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon.

THE contempts, that are thus punished, are either direct, which openly infult or resist the powers of the courts, or the persons of the judges who preside there; or else are consequential, which (without such gross insolence or direct opposition)

c Salk. 181. 2 Lord Raym. 1405.

plainly tend to create an universal disregard of their autho-The principal instances, of either fort, that have been ufually d punishable by attachment, are chiefly of the following kinds. 1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution; or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, certiorari, error fupersedeas, and the like. For, as the king's superior courts, (and especially the court of king's bench) have a general fuperintendance over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abufing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attorneys and folicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the mal-practice of the officers reflects fome dishonour on their employers: and, if frequent or unpunished, creates among the people a difgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office: such as making default, when fummoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when fummoned, refusing to be fworn or examined, or prevaricating in their evidence when fworn. 6. Those committed by parties to any furt or proceeding before the court: as by difobedience to any

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rule or order, made in the progress of a cause; by nonpayment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for fubmitting to fuch determination . Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and nonperformance of awards, is to be looked upon rather as a civil execution (q) for the benefit of the injured party; though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that fuch contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon (r). And, upon a fimilar principle, obedience to any rule of court may also by statute 10 Geo. III. c. 50. be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, fuch as forcible rescous and the likef; or when they import a disobedience to the king's great prerogative writs, of prohibition, habeas corpus g, and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obflinacy, perverseness, or prevarication; by breach of the peace. or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting fuch writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any

e See Vol. III. pag. 17. g 4 Burr. 632. Lords Journ. 7 Febr. f Styl. 227. 2 Hawk. P. C. 152. 8 Jun. 1757. Cro. Jac. 419. Salk. 586.

<sup>(9) [</sup>Rex v. Stokes, Cowp. 136. Trin. term, 14 Geo. III. B. R.]

<sup>(</sup>r) [Rex v. Stokes, Mich. 23 Geo. II. K. B. cited in the above case.]

thing in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

THE process of attachment, for these and the like contempts, must necessarily be as antient as the laws themselves. For laws, without a competent authority to fecure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, refults from the first principles of judicial establishments, and must be an inseparable attendant upon every fuperior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author h feems inclinable to derive this process from the statute of Westm. 2. 13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be refifted by the power of any great man, the sheriff shall chastise the resisters by imprisonment, " a qua non deliberen-" tur sine speciali praecepto domini regis:" and if the sherisf himself be refisted, he shall certify to the courts the names of the principal offenders, their aiders, confenters, commanders, and favourers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleafure, without any interfering by any other person whatfoever) yet he afterwards more justly concludes, that it is a part of the law of the land; and, as fuch, is confirmed by the statute of magna carta.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges j, without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowlege, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a

k Gilb. Hift. C. P. ch 3.

contempt has been committed, they either make a rule on the suspected party to shew cause why an attachment should not iffue against him i; or, in very flagrant instances of contempt, the attachment iffues in the first instance k; as it also does, if no fufficient cause be shewn to discharge, and thereupon the court confirms and makes abfolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to fuch interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accufation, and must by the course of the court be exhibited within the first four days 1: and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out m. If the party can clear himself upon oath, he is difcharged; but, if perjured, may be profecuted for the perjury". If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and fometimes by a corporal or infamous punishment o. If the contempt be of fuch a nature, that, when the fact is once acknowleded, the court can receive no farther information by interrogatories than it is already possessed of, (as in the case of a rescous?) the defendant may be admitted to make fuch fimple acknowlegement, and receive his judgment, without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evafive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

It cannot have escaped the attention of the reader, that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the

i Styl. 277.

k Salk. 84. Stra. 185. 564.

<sup>1 6</sup> Mod. 73.

m Stra. 444.

n 6 Mod. 73.

º Cro. Car, 146.

PThekinger. Elkins. M. 8 Geo. III. B. R.

common law in any other instance q; and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a procels of contempt; acting only in personam and not in rem. And there, after the party in contempt has answered the interrogatories, fuch his answer may be contradicted and difproved by affidavits of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this fingular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely antient, and has in more modern times been recognized, approved, and confirmed by feveral express acts of parliament's, fo the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity, and by long and immemorial usage is now become the law of the land,

q See Vol. III. pag. 100, 101. II. st. 2. c. 2. §. 4. 9 & 10 W. III. r Yearb. 20 Hen. VI. 37. 22 Edw. c. 15. 12 Ann. st. 2. c. 15. §. 5.

IV. 29. t M. 5 Edw. IV. rot. 75. cited in 8 Stat. 43 Eliz. c. 6, §. 3. 13 Car. Raft. Ent. 268. pl. 5.

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CHAPTER THE TWENTY-FIRST.

### OF ARRESTS.

thod of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: vis. 1. Arrest; 2. Commitment and bail; 3. Prosecution; 4. Process; 5. Arraignment, and it's incidents; 6. Plea, and issue, 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be discussed in the subsequent part of this book.

First then, of an arrest: which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken. And, in general, an arrest may be made sour ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

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I. A WAR-

1. A WARRANT may be granted in extraordinary cases by the privy council, or fecretaries of state a; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them b: for it would be abfurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to fuch examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all fuch offences as they have power to punish by statute. Sir Edward Coke indeed chath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others d held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore fir Matthew Hale hath combated it with invincible authority, and strength of reafon: maintaining, 1. That a justice of peace hath power to iffue a warrant to apprehend a person accused of felony, though not yet indicted e; and, 2. That he may also issue a warrant to apprehend a person suspected of felony, though the -original fuspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of fuch fuspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to afcertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of sufpecting the party, against whom the warrant is prayed . This warrant ought to be under the hand and feal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the

a 1 Lord Raym. 65. b 2 Hawk. P. C. 84.

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e 4 Inft. 176.

d 2 Hawk. P. C. 84.

f Ibid. 110.

constable, or other peace officer, (or, it may be, to any private person by name g) requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant h. A general warrant to apprehend all persons suspected, without naming or particularly defcribing any person in special, is illegal and void for it's uncertainty i; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all perfons, guilty of a crime therein specified, is no legal warrant: for the point, upon which it's authority rests, is a fact to be decided on a fubfequent trial; namely, whether the perfon apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all; for it will not justify the officer who acts under it k; whereas a warrant, properly penned, (even though the magistrate who issues it should exceed his jurisdiction) will, by statute 24 Geo. II. c. 44. at all events indemnify the officer, who executes the fame ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is tefte'd, or dated, England; not Oxfordsbire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkthire, must be backed, that is, figned by a justice of the peace in another, as Middlesex, before it can be executed

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reign, and under every administration, except the four last years of queen Anne, 1 Hal. P. C. 580. 2 Hawk. P. C. down to the year 1763; when such a warrant being iffued to apprehend the authors, printers, and publishers of a certain feditious libel, it's validity was difputed; and the warrant was adjudged by the whole court of king's beach to be void, in the case of Money v. Leach. Trin. 5 Geo. III. B. R. After which, the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr.

<sup>8</sup> Salk. 176.

h 2 Hawk. P. C. 85.

k A practice had obtained in the fecretaries office ever fince the restoration, · grounded on some clauses in the acts for regulating the press, of issuing general warrants to take up (without naming any person in particular) the authors, printers and publishers of such obscene or feditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice 1766.) was inadvertently continued, in every

there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorised by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55. And now, by statute 13 Geo. III. c. 31. any warrant for apprehending an English offender, who may have escaped into Scotland, and vice versa, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms, in which such offence was committed.

2. Arrests by officers, without warrant, may be executed 7. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his prefence. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke m, hath great original and inherent authority with regard to arrefts. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony actually committed (s), or a dangerous wounding whereby felony is like to enfue, he may upon probable fuspicion arrest the felon; and for that purpose is authorifed (as upon a juftice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his affiftants be killed in attempting fuch arrest, it is murder in all concerned ". 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4. to keep watch and ward in all towns from funfetting to funrifing, or fuch as are mere affiftants to the constable, may virtute officii arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning o.

<sup>1</sup> r Hal. P. C. 86.

m See Vol. I. pag. 355.

n 2 Hal. P. C. 88-96.

o Ibid. 98.

<sup>(</sup>s) [In the case of Samuel against Payne and others, Dougle 545. it was adjudged in the K. B. that a peace-officer may justify an arrest on a reasonable charge of selony, without a securant, although it should afterwards appear that no felony had been consmitted; but a private individual cannot.]

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3. Any private person (and a fortieri a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers-by P. And they may justify breaking open doors upon following fuch felon: and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavouring to make fuch arrest, it is murder q. Upon probable fufpicion also a private person may arrest the felon, or other person so suspected. But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed,

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an hue and cry raised upon a selony committed. An hue (from huer, to shout) and cry, hutesum et clamor, is the old common law process of pursuing, with horn and with voice, all selons, and such as have dangerously wounded another. It is also mentioned by statute Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. de officio coronatoris. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country shall be so well kept, that immediately upon robberies and selonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the selons, and they that keep the town shall follow with hue and cry, with all the town and the

P 2 Hawk. P. C. 74.

<sup>9 2</sup> Hal. P. C. 77.

<sup>7</sup> Stat. 30 Geo. II. c. 24.

s 2 Hal. P. C. 82, 83.

t Bracton. 1. 3. tr. 2. c. 1. §. 1. Mirr. c. 2. §. 6.

towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that fuch hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3. to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the hundred, in case of any loss by robbery. By statute 27 Eliz. c. 13. no hue and cry is fufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II. c. 16. the constable or like officer, refusing or neglecting to make hue and cry, forfeits 5 1: and the whole vill or diffrict is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes. stitution, which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is faid to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts". Hue and cry x may be raifed either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to fearch his own town, and raise all the neighbouring vills, and make purfuit with horse and foot; and in the profecution of fuch hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a juftice of the peace. But if a man wantonly or maliciously raifes an hue and cry, without caufe, he shall be severely punished as a disturber of the public peace y.

In order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute

Bee Vol. III. pag. 161.

x 2 Hal. P. C. 100-104.

Mod. Un. Hift. vi. 383. vii. 156.

y 1 Hawk. P. C. 75.

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4 & 5 W. & M. c. 8. enacts, that fuch as apprehend a highwayman, and profecute him to conviction, shall receive a reward of 40 l from the public; to be paid to them (or, if deavour to take him, their executors) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a refervation of the right of any person from whom the fame may have been stolen: to which the statute 8 Geo. II. c. 16. superadds 10 1, to be paid by the hundred indemnified by fuch taking. By statutes 6 & 7 W. III. c. 17. and 15 Geo. II. c. 28. persons apprehending and convicting any offender against those statutes, respecting the coinage, shall (in case the offence be treason or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By ftatute 10 & 11 W. III. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary, housebreaking, horsestealing, or private larciny to the value of 5 s, from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31. any person so apprehending and profecuting a burglar, or felonious housebreaker, (or, if killed in the attempt, his executors) shall be entitled to a reward of 4012. By statute 6 Geo. I. c. 23. perfons discovering, apprehending, and profecuting to conviction, any person taking reward for helping others to their stolen goods, shall be entitled to forty pounds. By statute 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. any perfon apprehending and profecuting to conviction fuch as steal. or kill with intent to steal, any sheep or other cattle specified in the latter of the faid acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statute 16 Geo. II. c. 15. and 8 Geo. III. c. 15. perfons discovering, apprehending, and convicting, felons and others being found at large during the term for which they are ordered to be tranfported, shall receive a reward of twenty pounds.

The statutes 4 & 5 W. & M. c. S. burfing the sheriff's) are extended to the 6 & 7 W. III. c. 17. and 5 Ann. c. 31. county palatine of Durham, by Stat.

<sup>(</sup>together with 3 Geo. I. c. 15. §. 4. 14 Geo. III. c. 46, which directs the method of re-im-

#### CHAPTER THE TWENTY-SECOND.

## OF COMMITMENT AND BAIL

HEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: and how he is there to be treated, I shall next shew, under the second head, of commitment and bail.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of fuch prifoner, and the information of those who bring him: which, Mr. Lambard observes a, was the first warrant given for the examination of a felon in the English law. For, at the common law, nemo tenebatur prodere seipsum: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the fuspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge Otherwise he must either be committed to prison, or give bail; that is, put in fecurities for his appearance, to anfwer the charge against him. This commitment therefore being only for fafe custody, wherever bail will answer the fame intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capi113

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tal nature, no bail can be a fecurity equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to fave his own life? and what fatisfaction or indemnity is it to the public, to feize the effects of them who have bailed a murderer, if the murderer himfelf be suffered to escape with impunity? Upon a principle similar to which, the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three fureties of the fame quality with himself, did it with an exception to fuch as had embezzled the public money, or been guilty of treasonable practices b. What the nature of bail is, hath been shewn in the preceding book c, viz. a delivery or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have feen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire, in what cases the party accused ought, or ought not, to be admitted to bail.

And, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magiftrate, by the common law d, as well as by the statute Westm. 1. 3 Edw. I. c. 15. and the habeas corpus act, 31 Car. II. c. 2. And, left the intention of the law should be frustrated by the justices requiring bail to greater amount than the nature of the cafe demands, it is expressly declared by statute 1 W. & M. st. 2. c. 1. that excessive bail ought not to be required; though what bail shall be called excessive, must be left to the courts, on confidering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes infufficient bail, he is liable to be fined, if the criminal doth not appear. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common

Pott. Antiq. b. 1. c. 18.

d 2 Hawk. P. C. 90.

s See Vol. III. pag. 290.

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law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament. In order therefore more precisely to ascertain what offences are bailable,

LET us next fee, who may not be admitted to bail, or. what offences are not bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners convicted of particular offences: for then such imprisonment without bail is part of their fentence and punishment. But, where the imprisonment is only for fafe custody before the conviction, and not for punishment after. wards, in fuch cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, viz. the body of the accused; in order to infure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes? have no other fureties but the four walls of the prison. By the antient common law, before h and fince i the conquest, all felonies were bailable, till murder was excepted by flatute: fo that perfons might be admitted to bail before conviction almost in every case. But the statute Westm. I. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9. and 1 & 2 Ph. & Mar. c. 13. give farther regulations in this matter: and upon the whole we may collect k, that no justice of the peace can bail, r. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manflaughter, if the prisoner be clearly the flayer, and not barely fuspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Perfons outlawed: 6. Such as have abjured the realm: 7. Ap-

f 2 Hal. P. C. 127.

<sup>8</sup> c. 2. §. 24.

h 2 Inft. 189.

<sup>1</sup> In omnibus placitis de felonia foiet

in placito de bomicidio, ubi ad terrorem alter flatutum est. (Glanv. l. 14. c. 1.) k 2 Inst. 186. 2 Hal. P. C. 129.

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9. 159 provers, of whom we shall speak in a subsequent chapter, and persons by them accused: 8. Persons taken with the mainour, or in the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons, taken by writ de excommunicato capiendo: all which are clearly not admissible to bail by the justices. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Perfons charged with other felonies, or manifest and enormous offences, not being of good fame: and, 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as must be bailed upon offering sufficient furety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide: 15. Such persons, being charged with petit larciny, or any felony not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court of king's bench (or any judge m thereof in time of vacation) may bail for any crime whatfoever, be it treason", murder, or any other offence, according to the circumstance of the case. And herein the wisdom of the law is very manifest. low bail to be taken commonly for fuch enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a difcretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the sef-

<sup>1 2</sup> Inft. 189. Latch. 12. |Vaugh. 157. Comb. 111. 298. 1 Comyns (1 Anders. 298.) Dig. 495.

m Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason by

any of the queen's privy council.

<sup>·</sup> In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio. (Glan. l. 14. c. 1.) n In the reign of queen Elizabeth it Sciendum tamen qued, in boc placito, non folet accusatus per plegios dimitti, nisi ex regiae potestatis beneficio. (Ibid. c. 3.)

fion lasts; or such as are committed for contempts by any of the king's superior courts of justice p.

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the country gaol by the mittimus of the justice, or warrant under his hand and feal, containing the cause of his commitment; there to abide till delivered by due course of law q. But this impriforment, as has been faid, is only for fafe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with need. less fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only though, what are so requisite, must too often be left to the discretion of the gaolers; who are frequently a merciles race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape r: this being the humane language of our antient lawgivers s, " custodes poenan 66 fibi commissorum non augeant, nec eos torqueant; sed uma 66 saevitia remota, pietateque adhibita, judicia debite ana " quantur."

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P Staundf. P. C. 73. 64

<sup>2</sup> Inft. 381. 3 Inft. 34, 5 Flet. 1. 1. c. 26,

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CHAPTER THE TWENTY-THIRD.

# OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the sact by an inquest or grand jury; or without such previous finding. The former way is either by presentment, or indialment.

I. A Presentment, generally taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indicaments by a grand jury. A prefentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowlege or observation a, without any bill of indictment laid before them at the fuit of the king. As, the presentment of a nusance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment b, before the party presented can be put to answer it. An inquisition of office is the act of a jury, fummoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traverfed or denied; and therefore the inquest, or jury, ought to hear all that can be alleged on both fides. Of this nature are all inquisitions of felo de se; of flight in persons accused of felony; of deodands, and the like; and prefentments of petty offences in the theriff's tourn or court-leet, whereupon the prefiding officer may fet a fine. Other inquisitions may be afterwards traveried and examined; as particularly the coroner's inquifi-

a Lamb. Eirenarch. 1. 4. c. 5. b 2 Inft. 739.

tion of the death of a man, when it finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. An indictment c is a written accusation of one or more persons of a crime or misdemesnor, preferred to, and prefented upon oath by, a grand jury. To this end the sherist of every county is bound to return to every fession of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, fome out of every hundred, to inquire, prefent, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them d. They ought to be freeholders, but to what amount is uncertain. which feems to be casus omissus, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now fettled by feveral acts of parliament. However, they are ufually gentlemen of the best figure in the county. As many as appear upon this panel are fworn upon the grand jury, to the amount of twelve at the leaft, and not more than twentythree; that twelve may be a majority. Which number, 25 well as the constitution itself, we find exactly described, to early as the laws of king Ethelred f. " Exeant feniores dus-" decim thani, et praefectus cum eis, et jurent super sanctuarium " quod eis in manus datur, qued nolint ullum innocentem acce-" fare, nec aliquem noxium celare." In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two affociated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably

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c See appendix. §. 1.

d 2 Hal. P. C. 154.

e Ibid. 155.

f Wilk. LL. Angl. Sax. 117.

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found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who prefides upon the bench. They then withdraw, to fit and receive indictments, which are preferred to them in the name of the king, but at the fuit of any private profecutor; and they are only to hear evidence on behalf of the profecution: for the finding of an indictment is only in the nature of an inquiry or accufation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly perfuaded of the truth of an indictment, fo far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes g.

THE grand jury are fworn to inquire, only for the body of the county, pro corpore comitatus; and therefore they cannot regularly inquire of a fact done out of that county for which they are fworn, unless particularly enabled by act of parliament. And to fo high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And, by statute 2 Geo. II. c. 21. if the stroke or poisoning be in England, and the death upon the fea or out of England; or vice versa; the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13. 33 Hen. VIII. c. 23. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. And counterfeiters, washers, or minishers

& State Trials. IV. 183.

of the current coin, together with all manner of felons and their accessories, may by statute 26 Hen. VIII. c. 6. (confirmed and explained by 34 & 35 Hen. VIII. c. 26. §. 751 76.) be indicted and tried for those offences, if committed in any part h of Wales, before the justices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at present in the county of Hereford or Salop; and not, as it should seem, in the county of Chester or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII i. Murders also, whether committed in England or in foreign parts k, may by virtue of the statute 33 Hen. VIII. c. 23. be inquired of and tried by the king's special commission in any shire or place in the kingdom. By statute 10 & 11 W. III. c. 25. all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences against the black act, 9 Geo. I. c. 22. may be inquired of and tried in any county of England, at the option of the profecutor 1. So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by statutes 8 Geo. II. c. 20. and 13 Geo. III. c. 84. be inquired of and tried in any adjacent county. By statute 26 Geo. II. c. 19. plundering or stealing from any vessel in diffress or wrecked, or breaking any ship contrary to 12 Ann. ft. 2. c. 18 ". may be profecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as, by the statute 26 Hen. VIII. above-mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales ". Felonies committed out

1774, Parry and Roberts were convicted of plundering a veffel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester and not Salop was the next adjoining English county. But all the judges (in Nich. 15 Geo. III.) held the profecution to be regular.

h Stra. 533. S Mod. 134.

i See Hardr. 66.

k Ely's case, at the old bailey, Dec. 1720. Roache's case, Dec. 1775.

<sup>1</sup> So held by all the judges, H. 11. Geo. III. in the case of Richard Mortis on a case referred from the old balley.

m See page 244.

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of the realm, in burning or destroying the king's ships, magazines or stores, may by statute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63. misdemesnors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larciny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both. Or, he may be indicted in England for larciny in Scotland, and carrying the goods with him into England, or vice verfa; or for receiving in one part of the united kingdoms goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed: for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larciny in the fecond county, yet it is not a robbery or burglary in that jurifdiction. And if a person be indicted in one county for larciny of goods originally taken in another, and be thereof convicted . or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with fuch circumstances, as would have ousted him of his clergy by virtue of any statute made previous to the year 16919.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "ignoramus;" or, we know nothing of it; intimating, that though the sacts might possibly be true, that truth did not appear to them: but now, they affert in English, more absolutely, "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then

o 1 Hal. P. C. 507.

<sup>9</sup> Stat. 25 Hen. VIII. c. 3. 3 W.

endorse upon it, "a true bill;" antiently, "billa vera." The indictment is then said to be found, and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-sour of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, affenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury affent, it is a good presentment, though some of the rest disagree. And the indictment, when so found, is publicly delivered into court.

INDICTMENTS must have a precise and sufficient certainty. By statute I Hen. V. c. 5. all indictments must set forth the christian name, sirname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his person. The time, and place, are also to be afcertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place to be within the jurisdiction of the court; unless where the place is laid, not merely as a venue, but as part of the description of the facts. But sometimes the time may be very material, where there is any limitation in point of time affigned for the profecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no profecution shall be had for any of the treasons or misprissons therein mentioned (except an affassination defigned or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed s: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the

t 2 Hal. P. C. 161.

<sup>1 2</sup> Hawk. P. C. 435.

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offence, that no other words, however fynonymous they may feem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his alle-"giance;" antiently, " proditorie et contra ligeantiae fuae debi-" tum :" else the indictment is void. In indictments for murder, it is necessary to fay that the party indicted "murdered," not "killed" or "flew," the other; which till the late statute was expressed in Latin by the word "murdravit"." In all indictments for felonies, the adverb "feloniously, felonice," must be used; and for burglaries also, burglariter," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "rapuit," or "ravished," is necesfary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcinies also, the words " felonice cepit et asportavit, feloniously took and carried "away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible ". Lastly, in indictments the value of the thing. which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcinies this is neceffary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all forts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand.

THE remaining methods of profecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken with the mainour, that is, with the thing stolen upon him in manu. For he might, when so detected flagrante delicto, be brought into court, arraigned, and tried, without indictment: as by the

t See Vol. III. pag. 321.

Danish law he might be taken and hanged upon the spot, without accusation or trial w. But this proceeding was taken away by several statutes in the reign of Edward the third x: though in Scotland a similar process remains to this day x. So that the only species of proceeding at the suit of the king, without a previous indistment or presentment by a grand jury, now seems to be that of information.

III. INFORMATIONS are of two forts; first, those which are partly at the fuit of the king, and partly at that of a fubject; and fecondly, fuch as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a fort of qui tam actions, (the nature of which was explained in a former volume 2,) only carried on by a criminal instead of a civil process: upon which I shall therefore only observe, that by the statute 31 Eliz. c. 5. no profecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the profecutor, can be brought by any common informer after one year is expired fince the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such profecution be had after the expiration of two years from the commission of the offence.

The informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed ex officio by his own immediate officer, the attorney general: secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer: and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed ex officio by his own attorney general, are properly such enor-

w Stiernh. de jure Sucon. 1. 3. c. 5.

y Lord Kayms. I. 331.

x 2 Hal. P. C. 149.

z See Vol. 111. pag. 162.

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mous misdemessnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate profecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally referved in the great plan of the English constitution; wherein provision is wifely made for the due preservation of all it's parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemessions, riots, batteries, libels, and other immoralities of an atrocious kind a, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deferve the most public animadversion. And when an information is filed, either thus, or by the attorney general ex officio, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment.

There can be no doubt but that this mode of profecution, by information (or fuggestion) siled on record by the king's attorney general, or by his coroner or master of the crown-office in the court of king's bench, is as antient as the common law itself. For as the king was bound to profecute, or at least to lend the fanction of his name to a profecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misself-meshor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a

2 2 Hawk. P. C. 260.

1 Show, 118.

fuggestion

fuggestion on record, and to carry on the profecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemesnors only: for, wherever any capital offence is charged, the fame law requires that the accufation be warranted by the oath of twelve men, before the party shall be put to answer it, And, as to those offences, in which informations were allowed as well as indictments, fo long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the fame trial by jury was had, the fame judgment was given by the same judges, as if the profecution had originally been by indictment. But when the statute 3 Hen. VII. c. r. had extended the jurisdiction of the court of star-chamber, the members of which were the fole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assises or before the justices of the peace, who were to hear and determine the fame according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empfon and Dudley (the wicked inftruments of king Henry VII) by hunting out obfolete penalties, and this tyrannical mode of profecution, with other oppressive devices c, continually haraffed the subject and shamefully enriched the crown. The latter of these acts was foon indeed repealed by flatute I Hen. VIII. c. 6. but the court of star-chamber continued in high vigour, and daily increasing it's authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

Upon this diffolution the old common law d authority of the court of king's bench, as the cuftos morum of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in prac-

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tice. And it is observable, that, in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of fuch perfons as should offend a third time against the provisions of that statutef. It is true, fir Matthew Hale, who prefided in this court foon after the time of fuch revival, is faid to have been no friend to this method of profecution: and, if fo, the reason of such his dislike was probably the ill use which the master of the crown-office then made of his authority, by permitting the fubject to be haraffed with vexatious informations, whenever applied to by any malicious or revengeful profecutor; rather than his doubt of their legality, or propriety upon urgent occasions h. For the power of filing informations, without any control, then refided in the breast of the master: and, being filed in the name of the king, they subjected the profecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William i, to procure a declaration of their illegality by the judgment of the court of king's bench. But fir John Holt, who then prefided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every profecutor, permitted to promote fuch information, shall give fecurity by a recognizance of twenty pounds (which now feems to be too fmall a fum) to profecute the fame with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless

e Styl. Rep. 217. 245. Styl. pract. Reg. tit. Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152. f Stat. 16 Car. I. c. 10. §. 6.

g 5 Mod. 460. h 1 Saund. 301.

h 1 Saund. 301. 1 Sid. 174. i M.1 W. & M. 5 Mod. 459. Comb.

<sup>141.</sup> Far. 361. 1 Show. 106.

the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own fuit, filed by his attorney general, are no way restrained thereby.

THERE is one species of informations, still farther regulated by statute of Ann. c. 20. viz. those in the nature of a writ of quo warranto; which was shewn, in the preceding volume k, to be a remedy given to the crown against fuch as had usurped or intruded into any office or franchise. modern information tends to the fame purpose as the antient writ, being generally made use of to try the civil rights of fuch franchifes; though it is commenced in the fame manner as other informations are, by leave of the court, or at the will of the attorney general: being properly a criminal profecution, in order to fine the defendant for his usurpation, as well as to ouft him from his office; yet usually confidered at prefent as merely a civil proceeding.

THESE are all the methods of profecution at the fuit of the king. There yet remains another, which is merely at the fuit of the fubject, and is called an appeal.

IV. An appeal, in the fense wherein it is here used, does not fignify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original fuit, at the time of it's first commencement 1. An appeal therefore, when spoken of as a criminal profecution, denotes an accufation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury fuffered, rather than for the offence against the public. As this method of profecution is still in force, I cannot omit to mention it: but as it is very little in use, on account of the

k See Vol. III. pag. 262.

as appeller," the verb active, which ordinary fense of " appeal" in Engfignifies to call upon, fummon, or

challenge one; and not the verb neu-I It is derived from the French, ter, which fignifies the same as the

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great nicety required in conducting it, I shall treat of it very briefly; referring the student for more particulars to other more voluminous compilations m.

This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary fatisfaction, called a weregild, was confantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations, from our ancestors, the antient Germans; among whom, according to Tacitus o, " luitur homicidium certo armentorum ac pecorum numero; reci-" pitque satisfactionem universa domus P." In the same manner by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer and the friends of the deceafed who profecuted him, by caufing the malefactor to give unto them, or to the child or wife of him that was flain, a recompense which they called an eriach q. And thus we find in our Saxon laws (particularly those of king Athelstan 1) the several weregilds for homicide established in progressive order, from the death of the coorl or peafant, up to that of the king himself's. And in the laws of king Henry It, we have an account of what other offences were then redeemable by weregild, and what were As therefore, during the continuance of this cuftom, a process was certainly given, for recovering the weregild by the party to whom it was due; it feems that, when

subject was paid entirely to the relations of the party flain; but that of the king was divided; one half being paid to the public, the other to the royal family.

m 2 Hawk. P. C. ch. 23.

n Stiernh. de jure Sueon. l. 3. c. 4.

o de M. G. c. 21.

P And in another place. (c. 12.)

<sup>&</sup>quot; Delictis, pro modo poenarum, equorum

<sup>&</sup>quot; pecorumque numero convicti muletantur.

<sup>&</sup>quot; Pars muletae regi vel civitati; pars ipsi " qui vindicatur, vel propinquis ejus, ex-

<sup>&</sup>quot; folvitur."

<sup>4</sup> Spenfer's state of Ireland, pag. 1513. edit. Hughes.

I Judic. Civit. Lund. Wilk. 71.

s The weregild of a ceorl was 266 thry smas, that of the king 30,000; each thryfma being equal to about a shilling of our present money. The weregild of a

t c. 12.

u In Turkey this principle is still carried fo far, that even murder is never profecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the flaughter of their kinfmen: and if they rather choose (as they generally do) to compound the matter for money, nothing more is faid about it. (Lady M. W. Montague, lett. 42.)

these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the instiction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

But, though appeals were thus in the nature of profecutions for some atrocious injury committed more immediately against an individual, yet it also was antiently permitted, that any subject might appeal another subject of high-treason, either in the courts of common law w, or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battel awarded in the court of chivalry, on such an appeal of treason x: but that in the first was virtually abolished y by the statutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and in the second expressly by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of selony and mayhem.

An appeal of felony may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are larciny, rape, and arfon. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may inflitute this private process. The only crime against one's relation, for which an appeal can be brought, is that of killing him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four nearest degrees of blood 2. It is given to the wife, on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is loft and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was faid, must also be heir male, and such a one as was the

W Britt. c. 22.

x By Donald lord Rae against David Ramsey. (Rushw. vol. 2. part. 2. pag. 112.)

y 1 Hal. P. C. 349. z Mirr. c. 2. §. 7.

next heir by the course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wise, she only, and not the heir, shall have the appeal: 2. If there be no wise, and the heir be accused of the murder, the person, who next to him would have been heir male, shall bring the appeal: 3. If the wise kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9. all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same "praescriptio annalis, quae currit adversus actorem, si de homicidia ei non constet intra annum a caede facta, nec quenun quam interea arguat et accuseta."

THESE appeals may be brought, previous to any indictment; and if the appellee be acquitted thereon, he cannot be afterwards indicted for the fame offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when profecuted by the party injured, he was also understood to be acquitted of any crown profecution for the fame offence b: but, on the contrary, if he made his peace with the king, still he might be profecuted at the fuit of the party. And fo, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of the statute 3 Hen. VII. c. 1. in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it: though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and fuffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, "that nemo bis punitur pro eodem delicto." Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which preduced very great inconvenience, of which more hereafter.

b Ibid. 1. 1. c. 5.

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a Stiernh. de jure Gest. l. 3. c. 4. C See pag. 335.

If the appellee be acquitted, the appellor (by virtue of the statute of Westm. 2. 13 Edw. I. c. 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and, if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta d, proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty, he shall fuffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the fuit of the king, the king may pardon and remit the execution; on an appeal, which is at the fuit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery. In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority f. And the antient usage was, so late as Henry the fourth's time, that all the relations of the flain should drag the appellee to the place of execution g: a custom, founded upon that favage spirit of family resentment, which prevailed univerfally through Europe after the irruption of the northern nations, and is peculiarly attended to in their feveral codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state h. However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may

d 1. 1. c. 34. §. 48.

e 2 Hawk. P. C. 392. ! LL. Edm. §. 3.

g M. 11 Hen. IV. 12. 3 Inst. 131. h Robertson. Cha. V. i. 45.

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THESE are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

i 1 Hal. P. C. 9.

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### CHAPTER THE TWENTY-FOURTH.

## OF PROCESS UPON AN INDICTMENT.

TE are next, in the fourth place, to inquire into the manner of iffuing process, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately (or as foon as convenience permits) to be arraigned thereon. But if he hath fled, or fecretes himself, in capital cases; or hath not, in smaller misdemesnors, been bound over to appear at the affifes or fessions, still an indictment may be preferred against him in his absence; fince, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears: acording to the rules of equity in all cases, and the express provision of statute 28 Edw. III. c. 3. in capital ones, that no man shall be put to death, without being brought to answer by due process of law.

The proper process on an indictment for any petty midemessnor, or on a penal statute, is a writ of venire facias, which is in the nature of a summons to cause the party to appear. And if by the return to such venire it appears, that the party hath lands in the county whereby he may be distreined, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of capital shall IV.

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shall iffue, which commands the sheriff to take his body, and have him at the next affizes; and if he cannot be taken upon the first capias, a second, and a third shall issue, called an alias, and a pluries capias. But, on indictments for treason or felony, a capias is the first process; and for treason or homicide, only one shall be allowed to issue a, or two in the case of other felonies, by statute 25 Edw. III. c. 14. though the usage is to iffue only one in any felony; the provisions of this flatute being in most cases found impracticable b. And so, in the case of misdemesnors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of capias immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to purfue him to an outlawry, then a greater exactness is necessary. For, in such case, after the feveral writs have iffued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the exigent in order to his outlawry: that is, he shall be exacted, proclaimed, or required to furrender, at five county courts; and if he be returned quinto exactus, and does not appear at the fifth exaction or requifition, then he is adjudged to be outlawed, or put out of the protection of the law; fo that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

The punishment, for outlawries upon indictments for misdemessors, is the same as for outlawries upon civil actions; (of which, and the previous process by writs of capias, exigijacias, and proclamation, we spoke in the preceding book c) viz. forseiture of goods and chattels. But an outlawry in treason or selony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country d. His life is however still under the protection of the law, as hath formerly been

a See Append. §. 1.

c See Vol. III. p. 283, 4. d 2 Hal, P. C. 205.

observede: fo that though antiently an outlawed felon was faid to have caput lupinum, and might be knocked on the head like a wolf, by any one that should meet him f; because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid fuch inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in fo doing is guilty of murder s, unless it happens in the endeavour to apprehend him h. For any person may arrest an outlaw on a criminal profecution, either of his own head, or by writ or warrant of capias utlagatum, in order to bring him to execution. But fuch outlawry may be frequently reverfed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole out. lawry is illegal, and may be reverfed: upon which reverfal the party accused is admitted to plead to, and defend himself against, the indictment.

THUS much for process to bring in the offender after indictment found: during which stage of the prosecution it is that writs of certiorari facias are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the fovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is furmifed that a partial or infufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of nist prius : or, 3. It is fo removed, in order to plead the king's pardon there: or, 4. To iffue process of outlawry against the offender, in those

e See pag. 178. g 1 Hal. P. C. 497.

f Mirr. c. 4. §. 4. Co. Litt. 128. h Bracton. fol. 125.

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counties or places where the process of the inferior judges will not reach him. Such writ of certiorari, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A certiorari may be granted at the instance of either the prosecutor or the desendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is feldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below k.

At this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of certiorari be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

i 2 Hal. P. C. 210.

k 2 Hawk. P. C. 287. 4 Burr. 749.

## CHAPTER THE TWENTY-FIFTH.

#### ARRAIGNMENT OF AND IT'S INCIDENTS.

7 HEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon; which is the fifth stage of criminal profecution.

To arraign, is nothing elfe but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment a. The prisoner is to be called to the bar by his name; and it is laid down in our antient book b, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A. D. 1722. a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment c.

a 2 Hal. P. C. 216. b Bract. 1. 3. de coron. c. 18. S. 3. P. C. 219. 2 Hawk. P. C. 308. Mirr. c. 5. feet. 1. §. 54. Flet. l. 1. c. 31. §. 1. Brit. c. 5. Staundf. P. C.

<sup>78. 3</sup> Inft. 34: Kel. 10. 2 Hil. c State Trials. VI. 230.

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WHEN he is brought to the bar, he is called upon by name to hold up his hand: which though it may feem a trifling circumstance, yet is of this importance, that by the holding up of his hand constat de persona, and he owns himself to be of that name by which he is called d. However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowlegment will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously resuses to hold up his hand, but confesses he is the person named, it is fully sufficient.

THEN the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin) that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime, whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted; unless he chose it, for he might waive the benefit of the law: and therefore principal and acceffory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for non constitit whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be abfurd. However, this abfurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the acceffory: and therefore the law still continues that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute

<sup>4 2</sup> Hal. P. C. 219.

e Raym. 40S.

Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwife; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of suture contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and sounded on the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

WHEN a criminal is arraigned, he either flands mute, or eonfesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment, which is to be considered as the next stage of proceedings. But first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. REGULARLY a prisoner is said to stand mute, when, being arraigned for treason or selony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty, resusts to put himself upon the country. If he says nothing, the court ought exossico to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb ex visitatione. Dei. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner.

f Foster. 365, &c. 5 2 Hal. P. C. 316.

h 2 Hawk. P. C. 327.

foner, who hath never pleaded, and can fay nothing in arrest of judgment, is a point yet undetermined i.

Is he be found to be obstinately mute, (which a prisoner hath been held to be, that hath cut out his own tongue k) then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution. And as in this the highest crime, so also in the lowest species of selony, viz. in petit larceny, and in all misdemesnors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other selonies, or petit treason, the prisoner was not, by the antient law, looked upon as convicted, so as to receive judgment for the selony; but should, for his obstinacy, have received the terrible sentence of penance, or peine (which, as will appear presently, was probably nothing more than a corrupted abbreviation of prisone) forte et dure.

Before this was pronounced the prisoner had not only trina admonitio, but also a respite of a sew hours, and the sentence was distinctly read to him, that he might know his danger ": and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him; even though he was too stubborn to pray it ". Thus tender was the law of inflicting this dreadful punishment: but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him, without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

THE rack, or question, to extort a confession from criminals, is a practice of a different nature: this having been only

<sup>1 2</sup> Hal. P. C. 317. \*\* 3 Inft. 178. 1 2 Hawk, P. C. 329. 2 Hal. P. C. 321. 2 Hawk, P. C. 12 Hawk, P. C. 329. 2 Hal. P. C. 322.

used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a defign to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of Londono: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth P. But when, upon the affaffination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the affaffin to the rack, in order to discover his accomplices; the judges, being confulted, declared unanimously, to their own honour and the honour of the English law, that no fuch proceeding was allowable by the laws of England 9. It feems aftonishing that this usage, of administering the torture, should be faid to arise from a tenderness to the lives of men: and yet this is the reason given for it's introduction in the civil law, and it's subsequent adoption by the French and other foreign nations': viz. because the laws cannot endure that any man should die upon the evidence of a falfe, or even a fingle witness; and therefore contrivedthis method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the fenfibility of his nerves !- But there needs only to state accurately's, in order most effectually to expose, this inhuman species of mercy, the uncertainty of which, as a test, and criterion of truth, was long ago very elegantly pointed out by Tully: though he lived in a state wherein it was

<sup>° 3</sup> Inft. 35.

P Barr. 92. 496.

<sup>9</sup> Rushw. Coll. i. 638.

<sup>\*</sup> Cod. l. 9. t. 41. l. 8. & t. 47. l. 16. Fortesc. de LL. Ang. c. 22.

s The marquis Beccaria, (ch. 16.) in an exquisite piece of raillery, has proposed this problem, with a gravity and

precision that are truly mathematical;

<sup>&</sup>quot; the force of the muscles and the sen-

<sup>&</sup>quot; fibility of the nerves of an innocent

<sup>&</sup>quot; person being given, it is required to find the degree of pain, necessary to

<sup>&</sup>quot; make him confess himself guilty of a

<sup>&</sup>quot; given crime."

usual to torture flaves in order to furnish evidence: "tamen, favs he, "illa tormenta gubernat dolor, moderatur natura cu-" jusque tum animi tum corporis, regit quaesitor, flectit libido, " corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil " veritati loci relinquatur "

THE English judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more: that he have no fustenance, fave only, on the first day, three morfels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, till he died, or (as antiently the judgment ran) till he answered .

Ir hath been doubted whether this punishment sublisted at the common law w, or was introduced in confequence of the statute Westin. 1. 3 Edw. I. c. 12 x. which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record, (that hath yet been produced) previous to the reign of Edward I: but there are inftances on record in the reign of Henry III, where perfons accused of felony, and standing mute, were tried in a particular manner, by two fuccessive juries, and convicted; and it is afferted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony 2. This statute of Edward I directs such persons

t Pro Sulla. 28.

v 2 Hal. P. C. 319. 2 Hawk. P. C.

c. 34. 6. 33.

w 2 Inft. 179. 2 Hal. P. C. 322. (M. & Hen. IV. 2.) 2 Hawk. P. C. 330.

x Staundf. P. C. 149. Barr. \$2.

y Emlyn on 2 Hal. P. C. 322.

<sup>2</sup> Al common ley, avant le statute de Britton. c. 4. & 22. Flet. l. 1. West. 1. c. 12. fi afcun uft eftre appeal, et ust estre mute, ill serra convict de felony.

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as will not put themselves upon inquests of felonies before the judges at the fuit of the king, to be put into hard and " strong prison (soient mys en la prisone fort et dure) as those " which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, fo as to hasten the death of the miserable sufferer: and indeed any furcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the mirror. as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III b, that the prisoner might then possibly sublist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, pressing him to death, was gradually introduced between 31 Edw. III. and 8 Hen. IV. at which last period it first appears upon our books c; being intended as a species of mercy to the delinquent, by delivering him the fooner from his torment: and hence I prefume it also was, that the duration of the penance was then first altered; and instead of continuing till be anfwered, it was directed to continue till he died, which must very foon happen under an enormous preffure.

The uncertainty of it's original, the doubts that were conceived of it's legality, and the repugnance of it's theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the antient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in selony had been removed, the judgment of peine forteet dure might perhaps have still innocently remained,

<sup>\*</sup> ch. 1. 6. 9.

b 6 Rym. 13.

E Yearb. 8 Hen. IV. 14

d Et fuit dit, que le contraire avoit effre fait devant ces beurs. (Ibid. 2.)

as a monument of the favage rapacity with which the lordly tyrants of feodal antiquity hunted after escheats and forfeitures; fince no one would ever have been tempted to undergo fuch a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the lands, were faved in felony and petit treason; though not the forfeiture of the goods; and therefore this lingering punishment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and fo the lord loft his escheat. But in high treason, as standing mute is equivalent to a conviction, the fame judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction. And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20. that every person who. being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their confequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. And thus much for the demesnor of a prisoner upon his arraignment, by standing mute; which now, in all cases, amounts to a constructive confession.

II. THE other incident to arraignments exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.

But there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called approvement. And that is when a per-

e 2 Hawk. P. C. 331.

fon, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices of the same crime, in order to obtain his pardon. In this case he is called an approver or prover, probator, and the party appealed or accused is called the appellee. Such approvement can only be in capital of. fences; and it is, as it were, equivalent to an indictment, fince the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the perfon of the approver, which indeed are very numerous, he must put himself upon his trial, either by battel, or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon ex debito justitiae. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, viz. the convicting of some other person, and therefore his conviction remains absolute.

Bur it is purely in the discretion of the court to permit the approver thus to appeal, or not; and, in fact, this course of admitting approvements hath been long difused: for the truth was, as fir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when fuch appeals were more frequently admitted, great strictness and nicety were held therein g: though, fince their discontinuance, the doctrine of approvements is become a matter of more curiofity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the case of coining, robbery, burglary, house-breaking, horse-stealing, and larciny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. & M. c. 8.

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6 & 7 W. III. c. 17. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that, if any fuch offender, being out of prison, shall discover two or more persons, who have committed the like offences, fo as they may be convicted thereof; he shall in case of burglary or housebreaking receive a reward of 401, and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining h. And if any such person, having feleniously stolen any lead, iron, or other metals, shall difcover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 Geo. II. c. 30. be pardoned for all fuch felonies committed before fuch discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit fome one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if fuch accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be profecuted for that or any other previous offence of the fame degree 1.

h The pardon, for discovering of i The King v. Rudd; Mich. 16 fences against the coinage act of 15 Geo. III; on a case reserved from the Geo. II. c. 28. extends only to all such old bailey, Oct. 1775.

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### CHAPTER THE TWENTY-SIXTH.

# OF PLEA, AND ISSUE.

E are now to confider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that, of fanctuary; which is however necessary to be lightly touched upon, as it may give fome light to many parts of our an. tient law: it being introduced and continued during the fuperstitious veneration that was paid to confecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and facrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in fackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, viz. that he abjured the realm, and would depart from thence forthwith, at the port that should be affigned him, and would never return without leave from the king; he by this means faved his life, if he observed the conditions of the oath, by going with a crois in

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his hand and with all convenient speed, to the port assigned, and embarking. For if, during this forty days privilege of fanctuary, or in his road to the sea side, he was apprehended and arraigned in any court, for this selony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will a. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels b. The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the statute 21 Jac. I. c. 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a declinatory plea; which was the name also given to that of fanctuary. But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable selony, is entitled equally to his clergy after as before conviction; this course is extremely disadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requisite, is prayed by the convict before judgment is passed upon him.

I PROCEED therefore to the five species of pleas, beforementioned.

I. A PLEA to the jurisdiction, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriss's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged d.

II. A DEMURRER to the indictment. This is incident to criminal cases, as well as civil, when the fact as alleged is

a Mirr c. 1. §. 13. 2 Hawk. P. C. 335. c 2 Hal. P. C. 236. b 2 Hawk. P. C. 52. d 1bid. 256.

allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he infifts that the fact. as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for inftance, if a man be indicted for feloniously stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held o, that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others f, who hold, that in fuch case he shall be directed and received to plead the general iffue, not guilty, after a demurrer determined against him. Which appears the more reafonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty. And this feems to be a cafe of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in fome cases lose his property, yet the law will not suffer him by fuch niceties to lose his life. However, upon this doubt, demurrers to indictments are feldom used: fince the same advantages may be taken upon a plea of not guilty: or afterwards in arrest of judgment, when the verdict has established the fact.

III. A PLEA in abatement is principally for a misnosmer, a wrong name, or a false addition to the prisoner. As, if James Allen, gentleman, is indicted by the name of John Allen, esquire, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the in-

£ 2 Hal. P. C. 225.

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<sup>\* 2</sup> Hal. P. C. 257. f 3 Hawk. P. C. 334.

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dictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding volume h. But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, viz.

IV. Special pleas in bar; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal: but these are applicable to both appeals and indictments.

1. First, the plea of auterfoits acquit, or a former acquittal, is grounded on this univerfal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other profecution, before any court having competent jurisdiction of the offence; he may plead fuch acquittal in bar of any fublequent accufation for the fame crime. Therefore an acquit\_ tal on an appeal is a good bar to an indictment on the fame offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law k: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were patt; by which time it often happened that the witnesles died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts, that in-

h See Vol. 111. pag. 302.

<sup>1 2</sup> Hawk. P. C. ch. 23.

j 3 Mod. 194.

k 2 Hawk. F. C. 373.

dictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea, of auterfoits acquit on an indictment, shall be no bar to the profecuting of any appeal.

- 2. SECONDLY, the plea, of auterfoits convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of auterfoits acquit and auterfoits convict, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in
- 3. THIRDLY, the plea of auterfoits attaint, or a former attainder; which is a good plea in bar, whether it be for the fame or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead fuch attainder in bar to any fubsequent indictment or appeal, for the fame or for any other felony m. And this because, generally, fuch proceeding on a fecond profecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: fo that it is abfurd and fuperfluous to endeavour to attaint him a fecond time. But to this general rule however, as to all others, there are fome exceptions; wherein, cessante ratione, cessat et ipsa lex. As, I. Where the former attainder is reverfed for error, for then it

is the fame as if it had never been. And the fame reason holds, where the attainder is reverfed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, fuch attainder is no bar to an appeal: for the prior fentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the fuit of the subject, by suffering the prior fentence to stop the profecution of a fecond, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, is afterwards indicted as principal in another, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of auterfoits attaint is no bar, but he shall be compelled to take his trial, for the fake of public justice: because the accessories to fuch fecond felony cannot be convicted till after the conviction of the principal. And from these instances we may collect that the plea of auterfoits attaint is never good, but when a fecond trial would be quite superfluous o.

4. Lastly, a pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inslict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, before sentence is past; which gives it by much the preserence to pleading it after sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder cannot afterwards be restored, otherwise than by act of parliament. But, as the title of pardons is applicable to other stages of prosecution; and they have their respective force and essicacy, as well after as before conviction, outlawry, or

n Poph. 107.

attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title except only that of execution.

Before I conclude this head of special pleas in bar, it will be necessary once more to observe; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot refort to another if that be determined against him; (as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, nil debet, as he might at first: for he has made his election what plea to abide by, and it was his own folly to chuse a rotten defence) though, I fay, this strictness is observed in civil actions, quia interest reipublicae ut sit finis litium : yet in criminal profecutions in favorem vitae, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon iffue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of respondent ouster, and may plead over to the felony the general iffue, not guilty?. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereofit can be inflicted; viz. on the general iffue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that I consider,

V. The general issue, or plea of not guilty q, upon which plea alone the prisoner can receive his final judgment of death, In case of an indictment of selony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in essect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the sacts in treason are

laid to be done proditorie et contra ligeantiae fuae debitum; and, in felony, that the killing was done felonice; these charges, of a traiterous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.

WHEN the prisoner hath thus pleaded not guilty, non culpabilis, or nient culpable; which was formerly used to be abbreviated upon the minutes, thus, " non (or nient ) cul." the clerk of the affife, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him fo. This is done by two monofyllables in the fame spirit of abbreviation, " cul prit." which signifies first that the prisoner is guilty, (cul. culpable, or culpabilis) and then that the king is ready to prove him so; prit, praesto sum, or paratus verificare. This is therefore a replication on behalf of the king viva voce at the bar; which was formerly the courfe in all pleadings, as well in civil as in criminal caufes. And that was done in the concifest manner: for when the pleader intended to demur, he expressed his demurrer in a fingle word, " judgment;" fignifying that he demanded judgment whether the writ, declaration, plea, &c. either in form or matter, were fufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, " prit;" signifying that he was ready to prove his affertions: as may be observed from the year-books and other antient repositories of laws. this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book t, it was observed, that when the parties come to a fact, which is affirmed on one fide and denied on the other, then they are faid to be at iffue in point of

<sup>1 2</sup> Hal. P. C. 258.

t See Vol. III. pag. 312.

North's life of lord Guildford. 98.

fact: which is evidently the case here, in the plea of non cul. by the prisoner; and the replication of cul. by the clerk And we may also remember, that the usual conclusion of all affirmative pleadings, as this of cul. or guilty is, was by an averment in these words, " and this he is ready to verify; et " hoc paratus oft verificare:" which fame thing is here expressed by the single word "prit."

How our courts came to express a matter of this importance in fo odd and obscure a manner, " rem tantam tam ne-" gligenter," can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or elfe it was the short method of taking down in court, upon the minutes, the replication and averment; " cul. prit:" which afterwards the ignorance of fucceeding clerks adopted for the very words to be by them spoken ".

Bur however it may have arisen, the joining of issue, (which though now usually entered on the record w, is no otherwise joined x in any part of the proceedings) feems to be clearly the meaning of this obscure expression y; which has puzzled our most ingenious etymologists, and is commonly underflood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, " culprit, how wilt thou be tried?" for immediately upon iffue joined it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at prefent reference to appeals and approvements only wherein the appellee has his choice, either to try the accusa-

instances, in the abuse of two legal terms law-french is, " counter;" but we now of antient French; one, the prologue to all proclamations, " oyes," or hear ye, which is generally pronounced most unmeaningly "O yes:" the other, a more pardonable mistake, viz. when a jury are all fworn, the officer bids the crier

" Of this ignorance we may fee daily number them, for which the word in hear it pronounced in very good English, " count thefe."

w See Appendix, &. 1. x 2 Hawk. P. C. 399. Y 2 Hal. P. C. 258.

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tion by battel or by jury. But upon indictments, fince the abolition of ordeal, there can be no other trial but by jury, per pais, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country, if a commoner; and, if a peer, by God and his peers a; the indictment, if in treason, is taken pro confesse: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall now be convicted of the felony.

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

Z A learned author, who is very feldom mistaken in his conjectures, has observed that the proper answer is, "by God" or the country," that is, either by ordeal or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by ordeal

used formerly to be called judicium Dei. But it should seem, that when the question gives the prisoner an option, his answer must be positive: and not in the disjunctive, which returns the option back to the prosecutor.

a Kelynge 57. State Trials, possim.

b Stat. 12 Geo. III. c. 20.

CHAPTER THE TWENTY-SEVENTH.

# OF TRIAL AND CONVICTION,

THE feveral methods of trial and conviction of offenders established by the laws of England, were formerely more numerous than at present, through the superstition of our Saxon ancestors: who, like other northern nations, were extremely addicted to divination: a character, which Tacitus observes of the antient Germans. They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of salse witnesses, and in consequence of a notion that God would always interpose miraculously, to vindicate the guiltless.

I. The most antient b species of trial was that by ordeal; which was peculiarly distinguished by the appellation of judicium Dei; and sometimes vulgaris purgatio, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sortes, either fire-ordeal, or water-ordeal; the former being confined to persons of higher rank, the latter to the common people d. Both these might be per-

ferrum, vel per aquam, pro diversitate conditionis bominum: per ferrum calidum si fuerit bomo liber; per aquam, si suerit rusti. \*\*s. (Glanv. l. 14. c. 1.)

a de mor. Germ. 10.

b LL. Inae. c. 77.

c Mirr. c. 3. §. 23.

d Tenetur se purgare is qui accusatur, suffices. (Glanv. l. 14. c. 1.) per Dei judicium; seilicet per calidum

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formed by deputy: but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or else by walking, barefoot, and blindfold, over nine red-hot plowshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confessor, is mentioned to have cleared her character, when suspected of samiliarity with Alwyn bishop of Winchester.

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water; and, if he sloated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practised in many countries to discover witches, by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as had been well remarked s) to the most dubious crime in the world, the most dubious proof of innocence.

And indeed this purgation by ordeal feems to have been very antient, and very universal, in the times of superstitious barbarity. It was known to the antient Greeks: for in the

This is fill expressed in that common form of speech, "of going through 1.4. c. 1. fire and water to serve another."

f Tho. Rudborne Hift. maj. Winson.

ε Sp. L. b. 12. c. 5.

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Antigone of Sophocles h, a person, suspected by Creon of a misdemesnor, declares himself ready "to handle hot iron, " and to walk over fire," in order to manifest his innocence; which, the fcholiast tells us, was then a very usual purgation. And Grotius i gives us many inftances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, faid to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to fwim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, befides the usual methods of fire and water-ordeal, both parties are fometimes exposed to the fury of a tyger let loofe for that purpose: and, if the beaft spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion k.

ONE cannot but be aftonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be fuspended, by an immediate interposition of providence to fave the innocent, whenever it was prefumptuously re-And yet in England, fo late as king John's time, we find grants to the bishops and clergy to use the judicium ferri, aquae, et ignis 1. And, both in England and Sweden the clergy prefided at this trial, and it was only performed in the churches or in other confecrated ground; for which Stiernhook m gives the reason; " non defuit illis operae et " laboris pretium; semper enim ab ejusmodi judicio aliquid lucri " facerdotibus obveniebat." But, to give it it's due praife, we find the canon law very early declaring against trial by ordeal, or vulgaris purgatio, as being the fabric of the devil, cc cum sit contra praeceptum Domini, non tentabis Dominum " Deum tuum"." Upon this authority, though the canons

h v. 270.

i On Numb. v. 17.

k Mod. Univ. Hift. vii. 266.

<sup>1</sup> Spelm. Gloff. 435.

m de jure Sueonum, 1. 1. c. 8.

n Decret. part. 2. cauf. 2. qu. 5. diff.

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themselves were of no validity in England, it was thought proper (as had been done in Denmark above a century before °) to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen. III. according to sir Edward Coke P, or rather by an order of the king in council 9.

II. Another species of purgation, somewhat similar to the former, but probably fprung from a prefumptuous abufe of revelation in the ages of dark superstition, was the corfued or morfel of execration: being a piece of cheefe or bread, of about an ounce in weight, which was confecrated with a form of exorcism; defiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent ": as the water of jealoufy among the Jews was, by God's special appointment, to cause the belly to fwell and the thigh to rot, if the woman was guilty of adultery. This corfned was then given to the suspected person, who at the same time also received the holy facrament': if indeed the corfned was not, as some have sufpected, the facramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians asfure us, that Godwin, earl of Kent, in the reign of king Edward the confessor, abjuring the death of the king's brother, at last appealed to his corfned, " per buccellam deglutien-" dam abjuravit"," which stuck in his throat and killed him. This custom has been long fince gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people w.

Med. Un. Hift. xxxii. 105,

P 9 Rep. 32.

<sup>9 1</sup> Rym. Foed. 228. Spelm. Gloff. 326. 2 Pryn. Rec. Append. 20. Seld. Eadm. fol. 48.

<sup>\*</sup> Spelm. Gl. 439.

s Numb, ch. 5.

t LL. Canut. c. 6.

u Ingulph.

w As, " I will take the facrament upon it; may this morfel be my laA;" and the like.

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However we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprized to find, that in the kingdom of Pegu there still subsists a trial by the corfned, very fimilar to that of our ancestors, only substituting raw rice instead of bread x. And, in the kingdom of Mo. nomotapa, they have a method of deciding lawfuits equally whimfical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being fufficiently mafticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is abfolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undetermined y.

THESE two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, ows it's introduction among us to the princes of the Norman line. And that is

III. The trial by battel, duel, or fingle combat; which was another species of presumptuous appeals to providence, under an expectation that heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book 25 to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal inlemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore if the appellemnit sight in their proper persons.

x Mod. Univ. Hift. vii. 129.

z See Vol. III. pag. 337.

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lant or approver be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and resuse the wager of battel; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the mainour, or the murderer in the room with a bloody knife, the appellant may resuse that an innocent man should stake his life against one who is already half-convicted.

The form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vaftly more striking and folemn b. The appellee, when appealed of felony, pleads not guilty, and throws down his glove, and declares he will defend the fame by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, fwears to this effect. " Hoc audi, homo, quem per manum "teneo, &c. " hear this, O man, whom I hold by the " hand, who callest thyself John by the name of baptism, "that I, who call myself Thomas by the name of baptism, " did not feloniously murder thy father, William by name, " nor am any way guilty of the faid felony. So help me "God, and the faints; and this I will defend against thee "by my body, as this court shall award." To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: " hear this, O man, whom "I hold by the hand, who callest thyself Thomas by the " name of baptism, that thou art perjured; and therefore " perjured, because that thou feloniously didst murder my

<sup>\* 2</sup> Hawk. P. C. 427.

b Flet. 1. 1. c. 34. 2 Hawk. P. C. 426.

" father, William by name. So help me God and the faints: " and this I will prove against thee by my body, as this court shall award "." The battel is then to be fought with the fame weapons, viz. batons, the fame folemnity, and the same oath against amulets and forcery, that are used in the civil combat- and if the appellee be so far vanquished, that he cannot or will not fight any longer, he shall be ad. judged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have deter. mined in favour of the truth, and his blood shall be attaint. ed. But if he kills the appellant, or can maintain the fight from funrifing till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of craven, he shall lose his !beram legem, and become infamous; and the appellee full recover his damages, and also be for ever quit, not only of the appeal, but of all indictments likewise for the fame offence.

IV. THE fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliement, or the court of the lord high steward, when a peer is capitally indicted: for in case of an appeal, a peer shall be tried by jury d. Of this enough has been faid in a former chaptere; to which I shall only now add, that, in the method and regulations of it's proceedings, it differs little from the trial per patriam, or by jury: except that no special verdict can be given in the trial of a peer ; because the lords of parliament, or the lord high steward (if the trial te had in his court) are judges sufficiently competent of the law

to profecute in that court) and that its prisoner was the cause of his death; the prisoner, that he was innocental the charge against him. (Pott. Antique

c There is a striking resemblance between this process and that of the court of Areopagus at Athens for murder; wherein the profecutor and prifoner were both sworn in the most b. 1. c. 19.) folemn manner: the profecutor, that he was related to the deceased (for none but near relations were permitted

d 9 Rep. 30. 2 Inft. 49.

e See pag. 259. f Hatt, 116.

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that may arise from the fact: and except also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority g.

V. The trial by jury, or the country, per patriam, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter h: "nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae."

THE antiquity and excellence of this trial, for the fettling of civil property, has before been explained at large i. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in fuits between the king and the fubject, than in disputes between one individual and another, to fettle the metes and boundaries of private property. Our law has therefore wifely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of over and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory acculation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accufation, whether pre-

g Kelynge. 56. Stat. 7 W. III. c. 3. h 9 Hen. III. c. 29. i See Vol. III. pag. 379.

ferred in t shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and fuperior to all fuspicion. So that the liberties of England cannot but fubfift, fo long as this palladium remains facred and inviolate; not only from all open attacks, (which none will be fo hardy as to make) but also from all fecret machinations. which may fap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

What was faid of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks, with regard to the trial of criminal suits; indictments, informations, and appeals; which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When therefore a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, liberos et legales homines, de vicineto; that is freeholders, without just exception, and of the visue or neighbourhood: which is interpreted to be of the county where the fact is committed). If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impa-

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nelled by writ of venire facias to the fheriff, as in civil causes: and the trial in case of a misdemesnor is had at nisi prius, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of over and terminer and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that fession: and therefore it is there usual to try all felons immediately, or foon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol) to try persons indicted of fmaller misdemessnors at the same court in which they have pleaded not guilty, or traversed the indictment. But they usually give fecurity to the court, to appear at the next affifes or fession, and then and there to try the traverse, giving notice to the profecutor of the fame.

In cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's coin or feals) or misprission of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any fuch treason, except an attempt to affassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indicament, (which includes the caption k) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment 1; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel or jurors two days before his trial: and, laftly, that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him. And, by statute 7 Ann. c. 21. (which did not take place till after the decease of the late pretender) all persons, indicted for high treason or misprisson

k Foft 229. Append. 1.

<sup>1</sup> Ibid. 230.

lift of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53. else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of oyer and terminer. And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial.

WHEN the trial is called on, the jurors are to be fwom, as they appear, to the number of twelve, unless they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes. For it is here at least as necessary, as there, that the sherisf or returning officer be totally indifferent; that where an alien is indicted, the jury should be de medietate, or half foreigners, if so many are found in the place; (which does not indeed hold in treasons?, aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians under the statute 22 Hen. VIII. c. 10.) that on every panel there should be a competent number of hundredors; and that the particular jurors should be omni exceptione majores; not liable to objection either propter honoris respectum, propter desectum, propter affectum, or propter desictum.

m Foft. 250.

n 2 Hawk. P. C. 410.

See Vol. III. pag. 359.

P 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

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CHALLENGES upon any of the foregoing accounts are stiled challenges for cause; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to affign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may fometimes provoke a refentment; to prevent all ill confequences from which, the prisoner is still at liberty, if he pleases, peremptorily to fet him afide.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn 9.

THE peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never

9 2 Hawk. P. C. 413. 2 Hal. P. C. 271.

be tried. This reasonable boundary is settled by the common law to be the number of thirty-sive; that is, one under the number of three sull juries. For the law judges that five and thirty are sully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three sull juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty-sive, and will not retract his challenge, as with one who stands mute or resuses his trial; by sentencing him to the peine forte et dure in selony, and by attainting him in treason. And so the law stands at this day with regard to treason, of any kind.

Bur by statute 22 Hen. VIII. c. 14. (which with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person arraigned for felony, can be admitted to make any more than twenty peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one, what shall be done? The old opinion was, that judgment of peine forte et dure should be given, as where he challenged thirty-fix at the common laws: but the better opinion feems to be t, that fuch challenge shall only be difregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, " that he be not admitted to challenge more " than twenty;" the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly fworn,

IF, by reason of challenges or the default of the jurors, a fusficient number cannot be had of the original panel, a take

<sup>7 2</sup> Hal. P. C. 263.

<sup>1 2</sup> Hawk. P. C. 414.

t 3 Inft. 227. 2 Hal. P. C. 270.

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may be awarded as in civil causes ", till the number of twelve is sworn, " well and truly to try, and true deliverance make, " between our sovereign lord the king, and the prisoner " whom they have in charge; and a true verdict to give, " according to their evidence."

WHEN the jury is fworn, if it be a cause of any consequence, the indicament is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown, or profecution. But it is a fettled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general iffue, in any capital crime, unless some point of law shall arise proper to be debated w. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular x) feems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reafon can that affiftance be denied to fave the life of a man. which yet is allowed him in profecutions for every petty trefpass? Nor indeed is it strictly speaking a part of our antient law: for the mirrour y, having observed the necessity of counsel in civil suits, " who know how to forward and defend " the cause, by the rules of law and customs of the realm," immediately afterwards fubjoins; " and more necessary are "they for defence upon indictments and appeals of felony, " than upon other venial causes z." And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to

u See Vol. III. pag. 364. But, in mere commissions of gaol delivery, no tales can be awarded; though the court may ore tenus order a new panel to be returned instanter. (4 Inst. 68. 4 St. Tr. 728. Cooke's Case.)

w 2 Hawk. P. C. 400.

x Sir Edward Coke (3 Inft. 137.) gives another additional reason for this refusal, "because the evidence to con"vict a prisoner should be so manifest, as it could not be contradicted." Which,

lord Nottingham (when high steward) declared (3 St. Tr. 726.) was the only good reason that could be given for it.

у с. з. §. 1.

z Father Parsons the jesuit, and after him bishop Ellys, (of English liberty. ii. 26.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I, meaning (I presume) chapter 47 and 48 of the code which is usually attributed to that prince. "De causis criminalibus

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ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arifing on the trial, they are entitled to the affiftance of counsel. But, lest this indulgence should be intercepted by superior influence, in the case of state-criminals, the legislature has directed by statute 7 W. III. c. 3. that persons indicted for such high treason. as works a corruption of the blood, or misprision thereof. (except treason in counterfeiting the king's coin or feals) may make their full defence by counsel, not exceeding two, to be named by the prisoner and affigned by the court or judge; and the same indulgence, by statute 20 Geo. II. c. 30. is extended to parliamentary impeachments for high a eason, which were excepted in the former act.

THE doctrine of evidence upon pleas of the crown is, in in most respects, the same as that upon civil actions. There are however a few leading points, wherein, by feveral statutes, and resolutions, a difference is made between civil and criminal evidence.

FIRST, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. two lawful witnesses are required to convict a prisoner; unless he shall willingly and without viclence confess the same. By statute 1 & 2 Ph. & Mar. c. 10. a farther exception is made as to treasons in counterfeiting the king's feals or fignatures, and treafons concerning coin current within this realm; and more particularly by c. II. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 W. III. c. 25. & 15

et vel capitalibus nemo quaerat confilium; " quin implacitatus statim perneget, sinc " omni petitione confilii. - In aliis omnibus or toteft et debet uti confilio."-But this confilium, I conceive, fignifies only an imparlance, and the petitio confilii is craving leave to imparl; (See Vol. III. pag. 298.) which is not allowable in any eriminal profecution. This will be manifest by comparing this law with a contemporary passage in the grand couflumier of Normandy, (ch. 85.) which

speaks of imparlances in personal actions. " Après ce, est tenu le querele a " respondre; et aura congie de joy ecse feiller, s'il le demande : et quand il " sera conseille il peut nyer le faici dort " il est accuse." Or, as it stands in the Latin text, (edit. 1539.) " Querelati autem postea tenetur respondere; et la bebit licentiam consulendi, fi requirat; babito autem confilio, debet factum no-

<sup>&</sup>quot; gare que accufatus eft."

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& 16 Geo. II. c. 28. in their subsequent extensions of this fpecies of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence and in such manner and form, as may be had and used against offenders for counterfeiting the king's money. But by statute 7 W. III. c. 3. in profecutions for those treafons to which that act extends, the fame rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall countervail the necessity of fuch proof, must be in open court. In the construction of which act it hath been holden a, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is fusficient to convict him of treason. hafty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promifes of favour, or menaces; feldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. the fame statute 7 W. III. it is declared that both witnesses must be to the same overtact of treason, or one to one overt act, and the other to another overt act, of the same species of treason b, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overtact not expressly laid in the indictment. And therefore in fir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament c was made on purpose to attaint him of treason, and he was executed d. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule e, that those laws which condemn a man to death in any case on the deposition of a lingle witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance f; there is a necessity therefore to call

<sup>2</sup> Foster. 240-244.

b See St. Tr. II. 144. Foster 235.

c Stat. 8 W. III. c. 4.

d Stat. Tr. V. 40.

e Sp. L. b. 12. c. 3.

f Beccar. c. 13.

in a third man to incline the scale. But this seems to be carrying matters too far: for there are fome crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested wit. ness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it; for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another f. In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to fecure the subject from being facrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reverfal of colonel Sidney's attainder by act of parliament in 1689 g it may be collected', that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury i.

THIRDLY, by the statute 21 Jac. I. c. 27. a mother of a bastard child, concealing it's death, must prove by one wirness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it k.

FOURTHLY, all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.

f 10 Mod. 194.

<sup>#</sup> St. Tr. VIII. 472.

h 2 Hawk. P. C. 431.

i Lord Preston's case. A. D. 1690. St. Tr. IV. 453. Francia's case, A. D.

<sup>1716.</sup> St. Tr. VI. 69. Layer's case. A. D. 1722. Ibid. 279. Henzey's case. A. D. 1758. 4 Burr. 644.

k See pag. 198.

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And fir Matthew Hale in particular lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual selony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be sound dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

LASTLY, it was an antient and commonly received practice m, (derived from the civil law, and which also to this day obtains in the kingdom of France ") that, as counsel was not allowed to any prisoner accused of a capital crime, fo neither should he be suffered to exculpate himself by the teftimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary I, (whose early fentiments, till her marriage with Philip of Spain, feem to have been humane and generous o) that when she appointed fir Richard Morgan chief justice of the common pleas, she injoined him, " that notwithstanding the old error, which " did not admit any witness to speak, or any other matter " to be heard, in favour of the adverfary, her majesty being " party; her highness's pleasure was, that whatsoever could " be brought in favour of the subject should be admitted to " be heard: and moreover, that the juffices should not per-" fuade themselves to fit in judgment otherwise for her high-" ness than for her subject P." Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by flatute 31 Eliz. c. 4.) it was provided that any person, impeached for such felony, " should be received " and admitted to make any lawful proof that he could, by " lawful witness or otherwise, for his discharge and defence:" and in general the courts grew fo heartily ashamed of a doctrine fo unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but

<sup>1 2</sup> Hal. P. C. 200.

m St. Tr. I. paffim.

n Domat. publ. law. b. 3. t. 1.

Montesq. Sp. L. b. 29. c. 11.

o See pag. 17.

P Hollingsh. 1112. St. Tr. 1. 72.

not upon oath q: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke r protefts very ftrongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as fcintilla juris against it's. And the house of commons were fo fensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland', when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they infifted on a clause, and carried it against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland w, " that in all " fuch trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the be-" nefit of fuch credible witnesses, to be examined upon oath, as can be produced for his clearing and justification." At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and selony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.

When the evidence on both fides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity \*) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a privy verdict \*. But the judges may adjourn, while the jury are withdrawn to confer, and re-

<sup>4 2</sup> Buift. 147. Cro. Car. 292.

r 3 Inft. 79.

s See also 2 Hal. P. C. 283. and his fummary. 264.

t Stat. 4 Jac. I. c. 1.

u Com. Journ. 4, 5, 12, 13, 15, 29, 439.

<sup>30</sup> Jun. 1607.

w Ibid. 4 Jun. 1607.

<sup>\*</sup> Co. Litt. 227. 3 Inft. 110. Foc. 27. Gould's cafe, Hil. 1764.

y 2 Hal. P. C. 300. 2 Hawk. P. C.

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turn to receive the verdict in open court x. And fuch public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts flated, it be murder, manflaughter, or no crime This is where they doubt the matter of law, and therefore chuse to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished, and the verdict fet aside by attaint at the suit of the king; but not at the fuit of the prisonery. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the difcretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by fir Thomas Smith, two hundred years ago; who accounted " fuch doings to be very violent, tyrannical, and contrary to " the liberty and custom of the realm of England 2." For, as fir Matthew Hale well observes a, it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: -unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances b, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully fet aside, and a new trial granted by the court of king's bench: for in fuch case, as hath been faid, it cannot be fet right by attaint. But there hath yet been no instance of granting a new trial, where the priioner was acquitted upon the first c.

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation d; except he be appealed of felony within the time limited by law. And

<sup>\* 3</sup> St. Tr. 731. 4 St. Tr. 231. Tr. X. 416. 455. 485.

y 2 Hal. P. C. 310.

Z Smith's commonw. l. 3. c. 1.

a 2 Hal. P. C. 313.

<sup>1</sup> Lev. 9. T. Jones. 163. St.

c 2 Hawk. P. C. 442.

d The civil law in fuch case only difcharges him from the fame accuser, but

not from the same accusation. (Ff. 48.

<sup>2. 7. 9. 2.)</sup> 

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upon fuch his acquittal, or discharge for want of prosecution, he shall be immediately set at large, without payment of any fee to the gaoler c. But if the jury find him guilty f. he is then faid to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found fo by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction, (or even upon an acquittal where there was a reasonable ground to profecute, and in fact a bona fide profecution) for any grand or petit lareiny or other felony, the reasonable expenses of profecution, and also, if the profecutor be poor, a compensation for his trouble and loss of time, are by statutes 25 Geo. II. c. 36. and 18 Geo. III. c. 19. to be allowed him out of the county stock, if he petitions the judge for that purpose; and by statute 27 Geo. II. c. 3. explained by the fame statute 18 Geo. III. c. 19. all persons, appearing upon recognizance or subpoena to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time. 2. On a conviction of larciny in particular, the profecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. But, it being confidered that the party, profecuting the offender by indictment, deserves to the full as much encouragement as he who profecutes by appeal, this statute was made, which enacts, that if any person be convicted of larciny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value

fence by his judges, the form of pronouncing that conviction was famething

e Stat. 14 Geo. III. c. 20. In the Roman republic, when the prisoner was convicted of any capital of-

peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard; " parum cavife-vide-66 tur." (Feffus. 325.)

g 3 Inft. 242.

of them out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this act having been in great measure conformable to the law of appeals, it has therefore in practice superceded the use of appeals of larciny. For instance: as formerly upon appeals h. so now upon indictments of larciny, this writ of restitution shall reach the goods fo stolen, notwithstanding the property i of them is endeavoured to be altered by fale in market overt k. And, though this may feem fomewhat hard upon the buyer, vet the rule of law is that " spoliatus debet, ante omnia, restitui;" especially when he has used all the diligence in his power to convict the felon. And, fince the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods, as are brought into court, to be made to the feveral profecutors. Or, elfe, fecondly, without fuch writ of restitution, the party may peaceably retake his goods, wherever he happens to find them 1, unless a new property be fairly acquired therein. Or, laftly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But fuch action lies not before profecution; for fo felonies would be made up and healed m: and also recaption is unlawful, if it be done with intention to fmother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter ".

It is not uncommon, when a person is convicted of a misdemesnor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the desendant to speak with the prosecutor,

h Bracton. de coron. c. 32.

i See Vol.II. pag. 450.

k J Hal. P. C. 543.

<sup>1</sup> See Vol. III. pag. 4.

m 1 Hal. P. C. 546.

n See pag. 133.

before any judgment is pronounced; and, if the profecutor declares himself satisfied, to inflict but a trivial punishment, This is done, to reimburse the profecutor his expenses, and make him some private amends, without the trouble and cir. cuity of a civil action. But it furely is a dangerous practice: and, though it may be intrusted to the prudence and discre. tion of the judges in the fuperior courts of record, it ough never to be allowed in local or inferior jurisdictions, such as the quarter-fessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucie than for the great ends of public justice. Above all it should never be fuffered, where the testimony of the prosecutor him. felf is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted; the profecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," fays an elegant writer, (who pleads with equal strength for the certainty as for the lenity of punishment,) " may be an act of good nature and humanity, but " it is contrary to the good of the public. For, although a " private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example, "The right of punishing belongs not to any one individual " in particular, but to the fociety in general, or the fove-" reign who reprefents that fociety: and a man may re-" nounce his own portion of this right, but he cannot give " up that of others."

. Becc. ch. 46.

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CHAPTER THE TWENTY-EIGHTH.

## OF THE BENEFIT OF CLERGY.

A FTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the benefit of clergy: a title of no small curiosity as well as use; and concerning which I shall therefore inquire, 1. Into it's original, and the various mutations which this privilege of clergy has sustained. 2. To what person it is to be allowed at this day.

3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the privilegium clericale, or in common speech the benefit of clergy, had it's original from the pious regard paid by christian princes to the church in it's infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of places, confecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the privilegium clericale.

But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a right

right of the highest nature, indefeasible, and jure divino2. By their canons therefore and constitutions they endeavoured at, and where they met with eafy princes obtained, a vaft extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universalb; as in regard to the persons exempted, among whom were at length comprehended not only every little fubordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England however, although the usurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from fecular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy : and therefore, though the antient privilegium clericale was in some capital cases, yet it was not universally, allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as foon as they were indicted: concerning the allowance of which demand there was for many years a great uncertaintyd: till at length it was finally fettled in the reign of Henry the fixth, that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinator plea; or, after conviction, by way of arresting judgment. This latter way is most usually practifed, as it is more to the fatisfaction of the court to have the crime previously afcertained by confession or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may posfibly be acquitted, and fo need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man should be admitted to the privilege of clergy, but fuch as had the habi-

a The pirncipal argument, upon " no harm." (Keilw. 181.) which they founded this exemption, was that text of fcripture; " touch not · mine anointed, and do my prophets

b See Vol. III. pag. 62.

c Keilw. 180.

d 2 Hat. P. C. 377.

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tum et tonsuram clericalem c. But in process of time a much widerand more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her fifter fuperfittion) being accounted a clerk or clericus, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonfure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally differninated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the privilegium clericale: and therefore by statute 4 Hen. VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the fame footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. cordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unlefs he produces his orders: and in order to diffinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but is held f to have been virtually restored by statute I Edw. VI. c. 12. which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand) for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches.

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<sup>&</sup>lt;sup>e</sup> 2 Hal. P. C. 372. M. Paris. A.D. f Hob. 294. 2 Hal. P. C. 375. 1259. See Vol. I. pag. 24.

AFTER this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclefiaftical canons. Whereupon the ordinary, not fatisfied with the proofs adduced in the profane fecular court, fet himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession f. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who fwore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only; and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prifoner; otherwise, if a clerk, he was degraded, or put to penance s. A learned judge, in the beginning of the last century h, remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party alfo, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to fwear himfelf not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This fcandalous profitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and

f Staundford. P. C. 138. b. 8 3 P. Wm. 447. Hop. 289.

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not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, absque purgatione faeienda: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly the statute 18 Eliz. c. 7. enacts, that, for the avoiding of fuch perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon fuch allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6. allowed, that women convicted of simple larcinies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a fimilar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatfoever; who were allowed once to claim the benefit of the flatute, in like manner as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the hand being found ineffectual, was also changed by statute 10 & 11 W. III. c. 23: inte Aa4

into burning in the most visible part of the left cheek, nearest the nose: but, such an indelible stigma being found by experience to render offenders desperate, this provision was repealed about seven years afterwards, by statute 5 Ann. c. 6. and, till that period, all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and selected male, upon branding, and peers and peeresses without branding, for the first offence: yet all liable (excepting peers and peeresses) if the judge saw occasion, to imprisonment not exceeding a year. And those men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was confidered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too fevere for those who had been liberally instructed, it was, a fortieri, too severe for the ignorant also, upon by the same statute 5 Ann. c. 6. it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. And experience having shewn, that so very univerfal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none) was as much too gentle; it was farther enacted by the fame statute, that when any person is convicted of any theft or larciny, and burnt in the hand for the fame according to the antient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour for any time not less than fix months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any persons shall be convicted of any larciny, either grand or petit, or any felonious eft

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nious stealing or taking of money or goods and chattels either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their difcretion, instead of fuch burning in the hand or whipping, may direct fuch offenders to be transported to America (or, by statute 19 Geo III. c. 74. to any other parts beyond the feas) for feven years: and if they return or are feen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes 16 Geo. II. c. 15. and 8 Geo. III. c. 15. many wife provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now, by the statute 19 Geo. III. c. 74. all offenders liable to transportation may in lieu thereof, at the discretion of the judges, be employed, if males (except in the case of petty larciny) in hard labour for the benefit of some public navigation; or, whether males or females, may in all cases be confined to hard labour in certain penitentiary houses, to be erected by virtue of the faid act, for the feveral terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape and are re-taken, for the first time an addition of three years is made to the term of their confinement; and a fecond escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanlines, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious restection, and to teach them both the principles and practice of every christian and moral duty. And if the whole of this plan be properly executed, and it's desects be timely supplied,

plied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time superfede the necessity of capital punishment, except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III. c. 74. that instead of burning in the hand (which was sometimes too slight and sometimes too disgraceful a punishment) the court in all clergyable selonies may impose a pecuniary sine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inslicted in the presence of two witnesses, and in case of semale offenders in the presence of semales only. Which sine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; tery considerably different from it's original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an abfurdity so gross, as must destroy it's very sundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the Ch.

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the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I AM next to inquire, to what persons the benefit of clergy is to be allowed at this day; and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of courfe without any transportation, fine, or whipping, (for those are only fubflituted in lieu of the other) to be admitted to this privilege, and immediately discharged; and this as often as they offend i. Again, all lords of parliament and peers of the realm having place and voice in parliament, by the ftatute 1 Edw. VI. c. 12. (which is likewise held to extend to peereffes k) shall be discharged in all clergyable and other felonies, provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in it's flead, in the fame manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or fuffering a discretionary imprifonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of fome navigation; or, in cafe of larciny, upon being transported for feven years, if the court shall think proper. It hath been faid, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders 1. But I must question whether this was ever ruled for law, fince the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which

liament, 22 Apr. 1776.

i 2 Hal. P. C. 375.

l 2 Hal. P. C. 373. 2 Hawk. P. C.

k Duchefs of Kingston's case, in par338. Fost. 306.

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every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what crimes the privilegium clericale, or benefit of clergy, is to be allowed. And. it is to be observed, that neither in high treason, nor in petit larciny, nor in any mere misdemessnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which for the most part became legally entitled to this indulgence by the statute de clero, 25 Edw. III. st. 3. c. 4. which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatfoever: for in fome it was denied even by the common law, viz. insidiatio viarum, or lying in wait for one on the highway; depopulatio agrorum, or destroying and ravaging a country 1; and combustio domorum, or arfon, that is, the burning of houses m; all which are a kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treafon, and very many other acts of felony, are oufted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which flatutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that is exerted before the privilegium clericale was at all indulged; and which it still exerts upon a fecond offence in almost all kinds of felonies, unless committed by clerks actually in orders. But fo tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII, c. 15. the benefit of clergy is not allowed in any case whatsoever;

<sup>1 2</sup> Hal. P. C. 333.

yet, when offences are committed within the admiraltyjurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner n. And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable. unless taken away by express words of an act of parliament. 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute P. 3. That, when the benefit of clergy is taken away from the offence, (as in case of murder, buggery, robbery, rape, and burglary) a principal in the fecond degree, being present, aiding, and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the person committing the offence, (as in the cafe of stabbing, or committing larciny in a dwelling-house, or privately from the person) his aiders and abetters are not excluded; through the tenderness of the law, which hath determined that fuch statutes shall be taken literally 9.

IV. LASTLY, we are to inquire what the confequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and suture credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

AND, we may observe, 1. That by this conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender. 2. That, after conviction, and till he receives the judgment

n Moor. 756. Foft. 283.

º 2 Hal. P. C. 330.

P 2 Hawk. P. C. 341.

<sup>9 1</sup> Hal. P. C. 529. Foster 356, 357.

r 2 Hal. P. C. 388.

of the law, by branding or fome of it's fubstitutes, or else is pardoned by the king, he is to all intents and purposes a felon. and fubicat to all the disabilities and other incidents of a felon . 3. That, after burning or it's substitute, or pardon. he is discharged for ever of that, and all other selonies before committed, within the benefit of clergy; but not of felonies from which fuch benefit is excluded: and this by flatutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning. or it's fubstitute, or the pardon of it, he is restored to all ca. pacities and credits, and the possession of his lands, as if he had never been convicted t. 5. That what is faid with regard to the advantages of commoners and laymen, fubiequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or fubjected to other punishment in it's stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it ".

<sup>\* 3</sup> P. Wms. 487.

u 2 Hal. F. C. 389, 390.

<sup>\* 2</sup> Hal. P. C. 389. 5 Rep. 110.

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CHAPTER THE TWENTY - NINTH.

## JUDGMENT AND CONSEQUENCES.

TE are now to confider the next stage of criminal profecution, after trial and conviction are past, in such crimes and misdemesnors, as are either too high or too low to be included within the benefit of clergy: which is that of judgment. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time foon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemesnor, (the trial of which may, and does usually, happen in his absence, after he has once appeared) a capias is awarded and iffued, to bring him in to receive his judgment; and, if he abfconds, he may be profecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment: as for want of fufficient certainty in fetting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be fet aside; but the party may be indicted again 2. And we may take notice, 1. That none of the statutes of jeofails b, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been obferved, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a " blemish and inconvenience in the law, and the administra-"tion thereof: for that more offenders escape by the over-

a 4 Rep. 45.

b See Vol. III. pag. 407.

" eafy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; viz. the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

If all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and confift generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or difgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public diffection. And, in case of any treason committed by a female, the judgment is to be burned alive (a). But the humanity of the English nation has authorized, by a tacit consent, analmost general mitigation of such part of these judgments as favours of torture or cruelty: a fledge or hurdle

c 2 Hal. P. C. 193.

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<sup>(</sup>a) But this is now altered by statute 30 Geo. III. c. 48. which enacts that in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned; and if any woman is convicted of petit treason, she shall be liable to such farther penalties as are directed by statute of 25 Geo. III. c. 37. to be given upon persons convicted of wilful murder.

being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any persons being embowelled or burned, till previously deprived of fensation by strangling. Some punishments confift in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a difability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or difmembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that confift principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for fuch crimes, as either arise from indigence, or render even opulence difgraceful. Such as whipping, hard labour in the house of correction or otherwise, the pillory, the stocks, and the ducking-stool.

Discusting as this catalogue may feem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is afcertained for every offence; and that it is not left in the breaft of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be flaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And befides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity VOL. IV. ВЬ or or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may feem an exception to this rule. But the general nature of the punishment, viz. by fine or imprisonment, is, in these cases, fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The quantum, in particular, of pecuniary fines neither can, nor ought to be, afcertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty denarii: this, in the more opulent days of the empire, grew to be a punishment of fo little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often afcertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain fum: which is fully fushcient, when we consider, that however unlimited the power of the court may feem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights d has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the fecond) and the same statute

farther declares, that all grants and promises of fines and forseitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before e, that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also being usually regulated by the determination of magna carta, c. 14. concerning amercements for misbehaviour by the fuiters in matters of civil right. " Liber homo non amercie-" tur pro parvo delicto, nisi secundum modum ipsius delicti; et " pro magno delicto, secundum magnitudinem delicti; salvo " contenemento suo; et mercator eodem modo, salva mercandisa " sua; et villanus eodem modo, amercietur, salvo wainagio suo." A rule, that obtained even in Henry the fecond's time f, and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: faving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to afcertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (" fit in misericordia") shall be set, ponatur, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the affessment or affeerment of the coroner, a fworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1. e. 18; and then the judges estreated them into the exchequer g. But in the court leet and court baron it is still performed by affeerors, or suitors sworn to affeere, that is, tax and moderate the general amercement according to the particular circumstances of the offence and

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g F. N. B. 75.

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the offender h. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inslicted by them on a stranger (not being party to any suit) it was then denominated a fine i; and the antient practice was, when any fuch fine was imposed, to inquire by a jury 46 quantum inde regi dare valeat per annum, salva sustentatione " fua, et uxoris, et liberorum suorumj." And fince the disuse of fuch inquest, it is never usual to affess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ranfoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ranfomed by a pecuniary fine k: according to an antient maxim, qui non habet in crumena luat in corpore. Yet, where any statute speaks both of fine and ranfom, it is holden, that the ranfom shall be treble to the fine at least 1.

When fentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer sit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of insamy upon him, puts him out of it's protection, and takes no farther care of him than barely to see him executed. He is then called attaint, attinctus, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law. This is after judgment: for there is great difference between a man convicted, and attainted; though they are frequently

the very terms of magna carta. Fitzh.

Survey. ch. 11.

k Mirr. c. 5. §. 3. Lamb. Eirenarch.
575.

Dyer. 232.

i 8 Rep. 40.

i Gilb. Exch. c. 5.

m 3 last. 213.

through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be faid in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for abfconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be faid to be attainted.

THE consequences of attainder are forfeiture and corruption of blood.

I. Forfeiture is twofold; of real, and personal estates. First, as to real estates: by attainder in high treason a man sorfeits to the king all his lands and tenements of inheritance, whether see-simple or see-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown: and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact: and therefore a wise's jointure is not forseitable for the treason of her husband; because settled upon her previous to the treason committed. But her dower

P. C. 240. 2 Hawk. P. C. 448.

Bb3

is forfeited, by the express provision of statute 5 & 6 Edw. VI. c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason? for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treason? But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forseited?

THE natural justice of forfeiture or confiscation of property, for treason , is founded in this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with fociety; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which focial advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the fense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful fentiment of Cicero's, nec vero me fugit quam sit acerbum, parentum scelera filiorum o poenis hui : sed hoc praeclare legibus comparatum est, ut caritas " liberorum amiciores parentes respublicae redderet." And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for de-

P 1 Hal. P. C. 359.

<sup>9</sup> Cc. Litt. 13.

<sup>7 4</sup> Rep. 57.

f See Vol. I. pag. 259.

s ad Brutum, ep. 12.

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fpiling the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience t. Yet many nations have thought, that this posthumous punishment favours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of fociety, as treafon against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, " ibi esse poenam, ubi et noxa est;" and ordered that " peccata suos teneant auctores, nec ulterius progre-" diatur metus, quam reperiatur delictum v:" and Justinian also made a law to restrain the punishment of relations "; which directs the forfeiture to go, except in the case of crimen majestatis, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent w: and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle x, (copied almost verbatim from Justinian's code y) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's particular bounty. But they are deprived of all their effects and rights of fuccession, and are rendered incapable of any honor ecclefiaftical or civil: " to the end " that, being always poor and necessitous, they may for ever " be accompanied by the infamy of their father: may lan-"guish in continual indigence; and may find (fays this " merciless edict) their punishment in living, and their re-" lief in dying."

WITH us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal policy, (as has been already observed 2) but was antecedent to the establishment of that system in this island; be-

t Gravin. 1. 5. 68.

v Cod. 9. 47. 22.

u Nov. 134. c. 13.

w Qu. Curt. 4.6.

x cap. 24.

y 1. 9. t. 8. 1. 5:

z See Vol. II. pag. 251.

Bb4

ing transmitted from our Saxon ancestors 2, and forming 2 part of the antient Scandinavian constitution b. But in certain treasons relating to the coin, (which, as we formerly observed, seem rather a species of the crimen falfi, than the crimen laefae majestatis) it is provided by some of the modern flatutes c which constitute the offence, that it shall work no forfeiture of lands, fave only for the life of the offender; and by all, that it shall not deprive the wife of her dowerd. And, in order to abolish such hereditary purishment entirely, it was enacted by statute 7 Ann. c. 21. that after the decease of the late pretender, no attainder for treason should extend to the difinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat fingular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England; and particularly in it's confequence of forfeitures of entailed estates, which was more peculiarly English; yet it feemed necessary, that a crime so nearly affecting government fhould, both in it's effence and confequences, be put upon the fame footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the house of lords as firmly re-At length a compromise was agreed to, which is established by this statute, viz. that the same crimes, and no other, should be treason in Scotland that are so in England; and that the English forfeitures and corruption of blood should take place in Scotland, till the death of the then pretender; and then cease throughout the whole of Great Britain : the lords artfully proposing this temporary clause, in

<sup>2</sup> LL. Aelfr. c. 4. Canut. c. 54.

b Stiernh. de jure Gotb. l. 2. c. 6.

<sup>&</sup>amp; 1.3. c. 3.

c Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.

d Ibid. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

e Burnet's Hift. A. D. 1709:

hopes (it is faid f) that the prudence of succeeding parliaments would make it perpetual s. This has partly been done by the statute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of these indemnifying clauses being thereby still farther suspended, till the death of the fons of the pretender h.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and, after his death, all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste i. Formerly the king had only a liberty of committing wafte on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows. and cutting down their woods. And a punishment of a fimilar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Danielk and Ezral; which, besides the pain of death inflicted on the delinquents there specified, ordain, " that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit m: and therefore magna carta n provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. II. de praerogativa regis feems to suppose, that the king shall have his

feiture. 6.

<sup>8</sup> See Foft. 250.

h The justice and expediencey of this provision were defended at the time, with much learning and strength of argument, in the confiderations on the law of

f Considerations on the law of for- forfeiture, first published A. D. 1744. (See Vol. I. pag. 244.)

i 2 Inft. 37.

k ch. iii. v. 29.

<sup>1</sup> ch. vi. v. 11.

m Mirr. c. 4. §. 16. Flet. 1. 1. c. 28.

n 9 Hen. III. c. 22.

year, day, and waste: and not the year and day instead of wafte. Which fir Edward Coke (and the author of the mirror before him) very justly look upon as an encroachment, though a very antient one, of the royal prerogative?. This year, day, and wafte are now usually compounded for; but otherwise they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir, (as in gavelkind tenure it still does) did not it's feodal quality intercept fuch descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a felo de se forfeits no lands of inheritance or freehold, for he never is attainted as a felon P. They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon fuch as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

These are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of praemunire and others: because I look upon them rather as a part of the judgment and penalty, inslicted by the respective statutes, than as consequences of such judgment; as in treason and selony they are. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of, misprision of treason, and striking in Westminsterhall, or drawing a weapon upon a judge there, sitting in the king's courts of justice.

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprisson

<sup>·</sup> Mirr. c. 5. §. 2. 2 Inft. 37.

<sup>9</sup> Ibid. 213.

P 3 Inft. 55.

<sup>1</sup> Ibid. 141.

thereof, petit treason, felonies of all forts whether clergyable or not, self-murder or felony de se, petit larciny, standing mute, and the above-mentioned offences of striking, &c. in Westminster-hall. For flight also, on an accusation of treason, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the slight, the party shall forfeit his goods and chattels: for the very slight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the slight: forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. I. Lands are forfeited upon attainder, and not before: goods and chattels are forfeited by conviction. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the exigent. without staying till he is quinto exactus, or finally outlawed; for the fecreting himself so long from justice, is construed a flight in law s. 3. The forfeiture of lands has relation to the time of the fact committed, fo as to avoid all subsequent fales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; fo that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may bona fide fell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction t: for perfonal property is of

f Staundf. P. C. 183. b.

<sup>3 3</sup> Inft. 232.

t 2 Hawk. P. C. 454.

BOOK IV.

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fo fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or selony. Yet if they be collusively and not bona side parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5.) will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so in case he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other here-ditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the see, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, where-ever they are obliged to derive a title through him to a remoter ancestor.

This is one of those notions which our laws have adopted from the feodal constitutions, at the time of the Norman conquest; as appears from it's being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere selony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feodal tenure is now happily worn away in these kingdoms, it is to be hoped, that this corruption of blood, with all it's connected consequences, not only of present escheat, but of suture incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different sooting from the forseiture of lands for high

treason, affecting the king's person or government. indeed the legislature has, from time to time, appeared very inclinable to give way to fo equitable a provision; by enacting, that, in certain treasons respecting the papal supremacy " and the public coin x, and in many of the new-made felonies, created fince the reign of Henry the eighth by act of parliament, corruption of blood shall be faved. But as in fome of the acts for creating felonies (and those not of the most atrocious kind) this faving was neglected, or forgotten, to be made, it feems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undiffinguishing law: especially as by the afore-mentioned statute of 7 Ann. c. 21. (the operation of which is postponed by statute 17 Geo. II. c. 39.) after the death of the fons of the late pretender, no attainder for treason will extend to the difinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many forts of felony.

w Stat. 5 Eliz. c. 1.

x Stat. 5 Eliz. c. 11, 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

## CHAPTER THE THIRTIETH.

## OF REVERSAL OF JUDGMENT.

E are next to confider how judgments, with their feveral connected confequences, of attainder, forfeiture, and corruption of blood, may be fet aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falfified, reverfed, or avoided, in the first place, without a writ of error, for matters foreign to or debors the record, that is, not apparent upon the face of it; fo that they cannot be affigned for error in the fuperior court, which can only judge from what appears in the record itfelf: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a diminution of the record, and cause it to be rectified. Thus, if any judgment whatever be given by perfons, who had no good commission to proceed against the person condemned, it is void; and may be falfified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interpolition or presence of

of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falfified upon bare inspection without the trouble of a writ of error a; it being a high misdemesnor in the judges so proceeding, and little (if any thing) fhort of murder in them all, in case the person so attainted be executed and fuffer death. So likewise if a man purchases land of another; and afterwards the vendor is. either by outlawry, or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby fuch land becomes liable to forfeiture or escheat: now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to fallify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not fuffered now to deny the fact, which he has by confession or flight acknowleged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falfify or contradict the fact of the crime committed; though he is at liberty to prove a mistake in time, or that the offence was committed after the alienation, and not before b.

SECONDLY, a judgment may be reverfed, by writ of error: which lies from all inferior criminal jurifdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offence, committed in the time of the late king, to be done against the peace of the present; and for many other similar

a 2 Hawk, P. C. 459.

b 3 Inft. 231. 1 Hal. P. C. 361.

causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemesnors, are not to be allowed of course, but on fufficient probable cause shewn to the attorney-general; and then they are understood to be grantable of common right, and ex debito justitiae. But writs of error to reverse attainders in capital cases are only allowed ex gratia; and not without express warrant under the king's fign manual, or at least by the confent of the attorney-general. These therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be fome confolation to his family. But the easier, and more effectual way, is,

LASTLY, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowleged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder, without casting any resections upon the justice of the preceding sentence (t).

THE effect of falfifying, or reverling, an outlawry is that the party shall be in the same plight as if he had appeared upon the capias: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-ap-

c I Vern. 170. 175.

<sup>(</sup>t) [This has been lately done with respect to the forseited estates in Scotland, by statute 24 Geo. III. c. 57.]

pearance,

pearance, remain good and effectual as before. But when judgment, pronounced upon conviction, is falfified or reverfed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseifor d. But he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

d 2 Hawk. P. C. 462.

CHAPTER THE THIRTY-FIRST.

## OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent,

I. A REPRIEVE, from reprendre, to take back, is the withdrawing of a fentence for an interval of time; whereby the execution is suspended. This may be, first, ex arbitrio judicis; either before or after judgment: as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of good delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right.

REPRIEVES may also be ex necessitate legis: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mere

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dictated by the law of nature, in favorem prolis; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who affisted at the facrifice, they cast it again into the fire as a young heretic b. A barbarity which they never learned from the laws of antient Rome; which direct , with the same humanity as our own, "quod praegnantis mulieris damnatae " poena differatur, quoad pariat:" which doctrine has also prevailed in England, as early as the first memorials of our law will reach d. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or difcreet women to inquire the fact: and if they bring in their verdict quick with child (for barely, with child, unless it be alive in the womb, is not fufficient) execution shall be staid generally till the next fession; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if the once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause . For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

ANOTHER cause of regular reprieve is, if the offender become non compos, between the judgment and the award of execution f: for regularly, as was formerly g observed, though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he

b Fox, Acts and Mon.

c Ff. 48. 19. 3.

d Flet. 1. 1. c. 38:

e 1 Hal. P. C. 369.

f Ibid. 370.

g See pag. 24

shall not be ordered for execution: for "furiofus folo furore " punitur," and the law knows not but he might have offered some reason, if in his senses, to have stayed these re-It is therefore an invariable rule, fpective proceedings. when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and, if he appears to be infane, the judge in his difcretion may and ought to reprieve him. Or, the party may plead in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, viz. that he is not the same that was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be instanter h, and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted i: neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable, whenever a man's life was in question k.

II. Is neither pregnancy, infanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest refort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is

h 1 Sid. 72. See Appendix. §. 3.
1 Fost. 42.

k Staundf. P. C. 163. Co. Lit. 157. Hal. Sum. 259.

j 1 Lev. 61. Foft. 42. 46. .

<sup>-1</sup> Law of forfeit. 09.

mercy. His power of pardoning was faid by our Saxon ancestors m to be derived a lege fuae dignitatis: and it is declared in parliament, by statute 27 Hen. VIII. c. 24. that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm n.

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deferved: holding a court of equity in his own breaft, to foften the rigour of the general law, in fuch criminal cases as merit an exemption from punishment. Pardons (according to some theorists °) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince feems a tacit difapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter p; or else it must be holden, what no man will feriously avow, that the situation and circumstances of the offender (though they alter not the effence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never fubfift; for there nothing higher is acknowleded than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to center in one and the fame This (as the prefident Montesquieu observes 9) would oblige him very often to contradict himfelf, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour.

m LL. Edw. Conf. c. 18.

h And this power belongs only to a king de facto, and not to a king de jure during the time of usurpation. (Bro.

Abr. t. charter de pardon. 22.)

Beccar. ch. 46.

P Ibid. ch. 4.

<sup>9</sup> Sp. L. b. 6. c. 5.

Holland therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere; and though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him therefore the people look up as the sountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that silial affection, and personal loyalty, which are the sure establishment of a prince.

UNDER this head, of pardons, let us briefly consider, 1. The object of pardon: 2. The manner of pardoning: 3. The method of allowing a pardon: 4. The effect of such pardon, when allowed.

1. And, first, the king may pardon all offences merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the habeas corpus act, 31 Car. II. c. 2. made a praemunire, unpardonable even by the king. Nor, 2. can the king pardon, where private juftice is principally concerned in the profecution of offenders: " non potest rex gratiam facere cum injuria et damno aliorum"." Therefore in appeals of all kinds (which are the fuit, not of the king, but of the party injured) the profecutor may releafe, but the king cannot pardon. Neither can he pardon a common nufance, while it remains unredreffed, or fo as to prevent an abatement of it; though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of fuits, yet (during it's continuance) this offence favours more of the nature of a private

r 3 Inft. 236,

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injury to each individual in the neighbourhood, than of a public wrong t. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought: for thereby the informer hath acquired a private property in his part of the penalty v.

THERE is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; viz. that the king's pardon cannot be pleaded to any fuch impeachment, fo as to impede the inquiry, and ftop the profecution of great and notorious offenders. Therefore when, in the reign of Charles the fecond, the earl of Danby was impeached by the house of commons of high treason, and other misdemesnors, and pleaded the king's pardon in bar of the fame, the commons alleged ", "that there " was no precedent, that ever any pardon was granted to any " person impeached by the commons of high treason, or other " high crimes, depending the impeachment;" and thereupon refolved w, " that the pardon fo pleaded was illegal and void, " and ought not to be allowed in bar of the impeachment of " the commons of England:" for which refolution they affigned x this reason to the house of lords, " that the setting " up a pardon to be a bar of an impeachment defeats the " whole use and effect of impeachments: for should this " point be admitted, or ftand doubted, it would totally dif-" courage the exhibiting any for the future; whereby the " chief institution for the preservation of the government "would be destroyed." Soon after the revolution, the commons renewed the fame claim, and voted y, "that a " pardon is not pleadable in bar of an impeachment." And, at length, it was enacted by the act of fettlement, 12 & 13 W. III. c. 2. "that no pardon under the great feal of Eng-" land shall be pleadable to an impeachment by the commons " in parliament." But, after the impeachment has been folemnly heard and determined, it is not understood that the

t 2 Hawk. P. C. 391.

v 3 Inft. 338.

u Com. Journ. 28 Apr. 1679.

w Ibid. 5 May 1679.

x Ibid. 26 May 1679.

v Ibid. 6 June 1639.

king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

2. As to the manner of pardoning. 1. First, it must be under the great feal. A warrant under the privy feal, or fign manual, though it may be a fufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon 2. 2. Next, it is a general rule, that, wherever it may reasonably be prefumed the king is deceived, the pardon is void 2. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed b. 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is prefumed the king knew not of those proceedings) but the conviction or attainder must be particularly mentioned; and a pardon of felonies will not include piracy d; for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Ric. II. st. 2. c. 1. that no pardon for treason, murder, or rape shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, affault, or malice prepenfe. Upon which fir Edward Coke observes e, that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with fuch high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that

z 5 St. Tr. 166. 173.

a 2 Hawk. P. C. 383.

b 3 Inft. 238.

c 2 Hawk. P. C. 383.

d 1 Hawk. P. C. 99.

e 3 Inft. 236.

which happens fe defendendo or per infortunium: to which two fpecies the king's pardon was expressly confined by the flatutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide shall be granted, but only where the king may do it by the oath of his crown; that is to fay, where a man flayeth another in his own defence. or by misfortune. But the statute of Richard the second, before-mentioned, enlarges by implication the royal power: provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a non obstante of the statute of king Richard. till the time of the revolution; when the doctrine of non obflante's ceasing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench f, that the king may pardon on an indictment of murder, as well as a fubject may discharge an appeal. Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially for the subject, and most strongly against the king.

A PARDON may also be conditional: that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law g. Which prerogative is daily exerted in the pardon of selons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years; such transportation or banishment he being allowable and warranted by the habeas corpus act, 31 Car. II. c. 2. §. 14. and both the imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74.

3. WITH regard to the manner of allowing pardons; we may observe, that a pardon by act of parliament is more be-

f Salk. 499.

<sup>£ 2</sup> Hawk. P. C. 394.

h Transportation is faid (Bar. 352.)

to have been first inslicted as a punishment, by statute 39 Eliz, c. 4.

neficial than by the king's charter; for a man is not bound to plead it, but the court must ex officio take notice of it :: neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon k. The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general iffue, he has waived the benefit of fuch pardon 1. But, if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Antiently, by statute 10 Edw. III. c. 2. no pardon of felony could be allowed, unless the party found sureties for the good behaviour before the sheriff and coroners of the county m. But that statute is repealed by the statute 5 & 6 W. & M. c. 13. which, instead thereof, gives the judges of the court a difcretionary power to bind the criminal, pleading fuch pardon, to his good behaviour, with two fureties, for any term not exceeding feven years.

4. LASTLY, the effect of fuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his sather, because the sather being made a new man, might transmit new inheritable blood: though, had he been born before the pardon, he could never have inherited at all.

i Fost. 43: k 2 Hawk. P. C. 397.

<sup>1</sup> Ibid. 396.

m Salk 499.

n See Vol. II. pag. 254.

CHAPTER THE THIRTY-SECOND,

## OF EXECUTION.

THERE now remains nothing to speak of, but execution: the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for fo doing was antiently by precept under the hand and feal of the judge, as it is still practifed in the court of the lord high steward, upon the execution of a peer a: though, in the court of the peers in parliament, it is done by writ from Afterwards it was established , that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or lift of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation d, "fuf. per coll." for " fuspendatur per collum." And this is the only warrant that the sheriff has, for so material an act as taking away the life of another e. It may certainly afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the feal of the court, without which the fheriff

a 2 Hal. P. C. 409.

b See append. §. 5.

Fiach. L. 4-8.

d Staundf. P. C. 182.

<sup>6 5</sup> Mod. 22.

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cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

THE sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London indeed a more folemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleafure, that the law must take it's course, iffues his warrant to the sheriffs; directing them to do execution on the day and at the place affigned f. And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by habeas corpus, a rule is made for his execution; either specifying the time and place g, or leaving it to the discretion of the sheriffh. And, throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after fentence passed i. But, otherwise, the time and place of execution are by law no part of the judgment k. It has been well observed 1, that it is of great importance, that the punishment should follow the crime as early as possible; that the profpect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution ferves only to separate these ideas: and then the execution itself affects the minds of the spectators rather as a terrible fight, than as the necessary confequence of transgression.

THE sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said. It is held also

f See append. §. 4.

g St. Trials. VI. 332. Foft. 43.

h See append. §. 3.

i See pag. 202.

k So held by the twelve judges,

Mich. 10 Geo. III.

<sup>1</sup> Beccar. ch. 19.

m See pag. 179.

by fir Edward Coke " and fir Matthew Hale o, that even the king-cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the fentence, the king may remit the reft. And, notwithstanding some examples to the contrary, fir Edward Coke stoutly maintains, that "judicandum est legi-" bus, non exemplis." But others have thought P, and more justly, that this prerogative, being founded in mercy and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (viz. by remitting a fevere kind of death, on condition that the criminal fubmits to a milder) is a matter that may bear confideration. It is observable, that when lord Stafford was executed for the popish plot in the reign of king Charles the fecond, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords, for a command or order from their lordships, how the faid judgment should be executed: for, he being profecuted by impeachment, they entertained a notion (which is faid to have been countenanced by lord Ruffel) that the king could not pardon any part of the fentence q. The lords refolved , that the scruples of the sheriffs were unnecessary, and declared, that the king's writ ought to be obeyed. Disappointed of raising a slame in that assembly, they immediately fignified 5 to the house of commons by one of the members, that they were not fatisfied as to the power of the faid writ. That house took two days to consider of it; and then t fullenly refolved, that the house was content that the sheriff do execute lord Stafford by severing his head from his body. It is further related, that when afterwards the same lord Ruffel was condemned for high treason upon indictment, the king while he remitted the ignominious part of

n 3 Inft. 52.

º 2 Hal. P. C. 412.

P Foft. 270. F. N. B. 244. h. 19 Rym. Feed. 284.

<sup>9 2</sup> Hum. Hift. of G. B. 328.

r Lords Journ. 21 Dec. 1680.

<sup>5</sup> Com. Journ. 21 Dec. 1689.

t Ibid. 23 Dec. 1680.

the fentence, observed, "that his lordship would now find he was possessed of that prerogative, which in the case of lord Stafford he had denied him "." One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again w. For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force \*, such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his sleeing to sanctuary was held an escape in the officer y.

And having thus arrived at the last stage of criminal proceedings, or execution, the end and completion of human punishment, which was the fixth and last head to be considered under the division of public wrongs, the fourth and last object of the laws of England; it may now feem high time to put a period to these commentaries, which the author is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions, that have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

u 2 Hume, 360.

w 2 Hal. P. C. 412. 2 Hawk. P. C.

y Fitzh. Abr. t. corone. 335. Finch.

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CHAPTER THE THIRTY-THIRD.

OF THE RISE, PROGRESS, AND GRA-DUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these commentaries, under their respective divisions: these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

THE feveral periods, under which I shall consider the state of our legal polity, are the following six: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to

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the revolution in 1688: 6. From the revolution to the prefent time.

I. AND, first, with regard to the antient Britons, the aborigines of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. How. ever, from Caefar's account of the tenets and discipline of the antient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points, which bear a great affinity and refemblance to some of the modern doctrines of our English law. Particularly, the very notion itfelf of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; fince it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did univerfally over Wales till the reign of Henry VIII, is undoubtedly of British origi-So likewife is the antient division of the goods of an intestate between his widow and children, or next of kin; which has fince been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the prefent volume, where the fame custom has continued from Caefar's time to the prefent; that of burning a woman guilty of the crime of petit treason by killing her husband (a).

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution

<sup>(</sup>a) But this is now altered by statute 30 Geo. 111. c. 48. See ante, p. 204.

tion, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very foon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages a, in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out, with any degree of accuracy, when the feveral mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can feldom pronounce, that this custom was derived from the Britons; that was left behind by the Romans; this was a neceffary precaution against the Picts; that was introduced by the Saxons, discontinued by the Danes, but afterwards reflored by the Normans.

WHEREVER this can be done, it is matter of great curiofity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, fuffer by degrees infensible variations in practice b: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can differn the changes of the bed of a river, which varies it's shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of it's laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses. Thirdly,

c Ibid. 59.

<sup>&</sup>lt;sup>2</sup> Hal. Hift. C. L. 62.

b Ibid. 57.

into our own fystem.

this uncertainty of the true origin of particular customs must also in part have arisen from the means, whereby christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries; who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the mosaical, but

also of the imperial and pontifical laws, blended and adopted

A FARTHER reason may also be given for the great variety, and of course the uncertain original, of our antient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into an heptarchy, confifting of feven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally fprung from the fame mother-country, the great northern hive; which poured forth it's warlike progeny, and fwarmed all over Europe, in the fixth and feventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common difpenfation of laws, though under the same sovereign Much more will it happen, where feven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the fame or similar foundations.

When therefore the West-Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as materly

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terly a manner. No less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of it's old difcordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform This he effected, by reducing and well-connected whole. the whole kingdom under one regular and gradual fubordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that masterpiece of judicial polity, the fubdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general refervoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wife institution has been preferved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his som bec, or liber judicialis. This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn; tribunals, which he established, for the trial of all causes civil and criminal, in the very diffricts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the univerfal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his houshold in those royal progresses, which he continually made from one end of the kingdom to the other.

THE Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their antient law; retaining however some sew of the customs of their late visitants; which went

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under the name of Dane-Lage: as the code compiled by Alfred was called the West-Saxon-Lage; and the local constitutions of the antient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the Mercen-Lage. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of it's first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

For king Edgar, (who befides his military merit, as founder of the English navy, was also a most excellent civil governor) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandfon king Edward the confessor afterwards completed; viz. one uniform digest or body of laws to be observed throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating fome of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the West-Saxon-Lage, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) of the rife and original of that admirable fyftem of maxims and unwritten customs, which is now known by the name of the common law, as extending it's authority univerfally over all the realm; and which is doubtless of Saxon parentage.

Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation: the avittena-gemote, or commune consilium of the antient Germans; which was not yet reduced to the forms and distinct

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tions of our modern parliament: without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-hought experience evinced the convenience and necessity of establishing an hereditary fuccession to the crown. But that of all subordinate magiftrates, their military officers or heretochs, their sheriffs, their conservators of their peace, their coroners, their port-reeves, (fince changed into mayors and bailiffs) and even their tythingmen and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever fince continued: only that perhaps, in case of minority, the next of kin of full age would afcend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence: even the most notorious offenders being allowed to commute it for a fine or weregild, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military fervices in proportion to every man's land, which much refembled the feodal conflitution; but yet were exempt from all it's rigorous hardships: and which may be well enough accounted for, by fupposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and fimplicity of the feodal law; before it got into the hands of the Norman jurists, who extracted the most flavish doctrines and oppressive confequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman

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conquest: though really inconvenient, and more especially destructive to antient families; which are in monarchies neneffary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, ac-· cording as he kept the three great festivals of christmas, easter, and whitfuntide. An inflitution which was adopted by king Alonfo VII. of Castile, about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home d. These county courts however differed from the modern ones, in that the ecclefiaftical and civil jurisdiction were blended together, the bishop and the ealderman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarraffed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity, o. Trials, among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the corfued or morfel of execuation, or by wager of law with compurgators, if the party chose it; but frequently they were also by jury: for, whether or no their juries confifted precifely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. stood the general frame of our polity at the time of the Norman invalion; when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and though the alteration of the former was effected rather by the

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comfent of the people, than any right of conquest, yet that confent feems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards enfued.

- 1. Among the first of these alterations we may reckon the feparation of the ecclefiaftical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for fome time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engroffed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal fees being then in the breaft of the king, he had taken care to fill them with Italian and Norman prelates.
- 2. Another violent alteration of the English constitution confifted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them, and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the flaughter of a beaft was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, purfue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to difturb any fowl of the air, or any beaft of the field, of fuch kinds as were specially reserved for the royal amusement of the fovereign, without express licence from the king, by a grant of a chase or free-warren: and those franchises were granted as much with a view to preferve the breed of animals, as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees grown

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grown entirely obsolete, yet from this root has sprung a baftard flip, known by the name of the game law, now arrived to and wantoning in it's highest vigour: both founded upon the fame unreasonable notions of permanent property in wild creatures; and both productive of the fame tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. in one respect the antient law was much less unreasonable than the modern: for the king's grantee of a chase or freewarren might kill game in every part of his franchife; but now, though a freeholder of less than 100 h a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and fubjecting himfelf to an action.

3. A THIRD alteration in the English laws was by narrowing the remedial influence of the county courts, the great feats of Saxon justice, and extending the original jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the aula regis, with all it's multifarious authority, was erected; and a capital justiciary appointed, with powers fo large and boundlefs, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of flavery, as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of f-

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king Edward came too late to eradicate. Instead of the plain and eafy method of determining fuits in the county courts. the chicanes and fubtleties of Norman jurisprudence had taken poffession of the king's courts, to which every cause of confequence was drawn. Indeed that age, and those immediately fucceeding it, were the aera of refinement and fubtilty. There is an active principle in the human foul, that will ever be exerting it's faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the groffest ignorance in point of literature; and those, who had leifure to cultivate it's progress, were such only as were cloistered in monasteries, the rest being all foldiers or peasants. unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rifing state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity, yet having only fuch tools to work with, their execution was trifling and flimfy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphyfical fubtilties, with a skill most amazingly artificial; but which ferves no other purpose, than to shew the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for univerfal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to superfede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to fay the truth, these **fcholaftic** 3

sto posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to it's pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable sictions, and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

- 4. A FOURTH innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.
- 5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the siction of seodal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and sines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period feems to have ground under as absolute a flavery, as was in the power of a warlike, an ambitious,

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bitious, and a politic prince to create. The consciences of men were enflaved by four ecclefiaftics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole farrago of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; fuch as transubstantiation, purgatory, communion in one kind, and the worship of faints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy fee. The laws too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to difperfe, and fire and candle to be extinguished, by eight at night, at the found of the melancholy curfeu. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vasals to the crown, and as absolute tyrants to the commons. Unheardof forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in purfuance of the new fystem of tenure. And, to crown all, as a consequence of the tenure by knight-fervice, the king had always ready at his command an army of fixty thousand knights or milites: who were bound, upon pain of confifcating their estates, to attend him in time of invafion, or to quell any domestic infurrection. Trade, or foreign merchandife, fuch as it then was, was carried on by the Jews and Lombards; and the very name of an English sleet, which king Edgar had rendered fo formidable, was utterly unknown to Europe: the nation confifting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or foldiery, who were the fubordinate landholders; and the burghers, or inferior tradefmen, who from their infignificancy happily retained, in their focage and burgage tenure, fome fome points of their antient freedom. All the rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon foresathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step essected, I now proceed to inquire.

WILLIAM RUFUS proceeded on his father's plan, and in fome points extended it; particularly with regard to the forest laws. But his brother and fuccessor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring (as our monkish historians tell us) the laws of king Edward the confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary fruits of his feodal tenures; but referved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the curfeu c; for, though it is mentioned in our laws a full century afterwards f, yet it is rather spoken of as a known time of night (so denominated from that abrogated usage) than as a still subfisting custom. There is extant a code of laws in his name, confifting partly of those of the confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains fome directions as to crimes and their punishments, (that of theft being made capital in his reign) and a few things relating to estates, parti-

e Speine. Codd. LL. W. I. 288. Hen. I. 299. f Stat. Civ. Lond. 13 Edw. I. cularly

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cularly as to the descent of lands: which being by the Saxon laws equally to all the fons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, " pri-" mum patris feudum," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; referving however these ensigns of patronage, conge d'eslire, custody of the temporalties when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclefiaftical courts, which union was foon diffolved by his Norman clergy: and, upon that final diffolution, the cognizance of testamentary causes feems to have been first given to the ecclefiastical court. The rest remained as in his father's time: from whence we may eafily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

THE usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry the fecond, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then slourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil: which though some of it be now antiquated and altered, yet, when compared with the code of Henry the sirst,

it carries a manifest superiority s. Throughout his reign also was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The conflitution of the parliament at Clarendon, A. D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the fecular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, in itinere; the king having divided the kingdom into fix circuits (a little different from the present) and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are faid to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the aula regis, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the fuitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of confiderable moment. 3. The introduction and establishment of the grand affife, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the antient subsidies granted to the crown by parliament, and the land tax of later times.

RICHARD the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour; which occasioned many difcontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on fuch as transgressed, in hunting; probably finding that their severity prevented profecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron: which are still extant, and of high authority: for in his time we began again to discover, that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croifade against the Saracens in the holy land.

In king John's time, and that of his fon Henry the third. the rigours of the feodal tenures and the forest laws were so warmly kept up, that they occasioned many infurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, magna carta, and carta de foresta. Of these the latter was well calculated to redrefs many grievances, and encroachments of the crown, in the exertion of forest law: and the former confirmed many liberties of the church, and redreffed many grievances incident to feodal tenures, of no fmall moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feodal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arifing from unreasonable amercements, from illegal distresses

or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the fame manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges fo as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the fubject over part of his personal estate, the rest being distributed among his wife and children: it laid down the law of dower, as it hath continued ever fince; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and meafures; gave new encouragements to commerce, by the protection of merchant ftrangers; and forbad the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the fuitors might no longer be harraffed with following the king's person in all his progreffes; and at the fame time brought the trial of iffues home to the very doors of the freeholders, by directing affifes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular award ing of inquests for life or member; prohibited the king's in ferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwife have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juftice, the county court, sherisf's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the king-And, lastly, (which alone would have merited the title that it bears, of the great charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.

However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his fon Henry the third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatife, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings h. Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the lefs, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgeffes to parliament. And here we conclude the fecond period of our English legal history.

III. THE third commences with the reign of Edward the first; who hath justly been stiled our English Justinian. For in his time the law did receive so sudden a perfection, that fir Mathew Hale does not scruple to affirm i, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of eccle-sastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as

h Hal. Hift. C. L. 156.

i Ibid. 158.

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they might not interfere with each other's proper bufiness: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He fettled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of confiderably greater, than by the alteration of the value of money they are now permitted to determine. 5. He fecured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without confent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of fending mandates to interfere in private causes. 7. He settled the form, folemnities, and effect, of fines levied in the court of common pleas; though the thing itself was of Sax-8. He first established a repository for the pubon original. lic records of the kingdom; few of which are antienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preferving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of quia emp-11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of elegit; which was of fignal benefit to a trading people: and, upon the fame commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being fwallowed, by his re-iterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 1.4. He

14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England (which was thoroughly completed in the reign of Henry the eighth); and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I MIGHT continue this catalogue much farther—but, upon the whole, we may observe, that the very scheme and\* model of the administration of common justice between party and party, was entirely fettled by this king k; and has continued nearly the fame, in all fucceeding ages, to this day; abating fome few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, confequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatifes, written in his time, as Britton, Fleta, Hengham, and the rest, are, for the most part, law at this day; or at least were so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact observation of magna carta, rather than from it's making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear it's head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his conflitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of fubstance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and confer-

k Hal. Hift. C. L. 162.

vators of the peace, were taken from the people in the reigns of Edward II and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have affumed it's present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this newmodelled affembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to fettle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the fecurity of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more confiderable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of praemunire, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the feeds of the general reformation, which were thereby first fown in the kingdom, were almost overwhelmed by the spirit of perfecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leifure for farther juridical

juridical improvement: "nam filent leges inter arma."—And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the siction of common recoveries, invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the sourch, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of uses, another of the clerical inventions.

In the reign of king Henry the feventh, his ministers (not to fay the king himself) were more industrious in hunting out profecutions upon old and forgotten penal laws, in order to extort money from the fubject, than in framing any new beneficial regulations. For the diftinguishing character of this reign, was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however falutary or otherwife in their future confequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the fubject. Informations were allowed to be received, in lieu of indictments, at the affifes and fessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy (which fo often intervened to stop attainders and fave the inheritance) was now allowed only once to lay offenders, who only could have inheritances A writ of capies was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, E e 3 introductive

introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz. the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to it's supremacy over spiritual men and causes, and the patronage of bishopricks being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to ecclesiastical polity completely restored.

WITH regard also to our civil polity, the statute of wills, and the statute of uses, (both passed in the reign of this prince) made a great alteration as to property: the former, by allowing the devife of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having it's full beneficial effect. And thence the courts of equity affumed a jurisdiction, dictated by common justice and common fense: which, however arbitrarily exercised or productive of jealousies in it's infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equi-From the statute of uses, and another statute of the same antiquity, (which protected estates for years from being destroyed by the reversioner) a remarkable alteration took place in the mode of conveyancing: the antient affurance by feoffment and livery upon the land being now very feldom practised, fince the more easy and more private invention of transferring property, by fecret conveyances to uses, and long terms of years being now continually created in mortgages

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and family fettlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

THE farther attacks in this reign upon the immunity of eftates-tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute de donis; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed fecurity; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying fome counties palatine, and abridging the unreasonable privileges of fuch as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII a very diffinguished aera in the annals of juridical history.

It must be however remarked, that (particularly in his later years) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, it's encroachments were established by law, under the fanction of those pusillanimous parliaments, one of which to it's eternal disgrace passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-stangled treasons, which were slightly touched upon in a former chapter! Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary,

1 See pag. 86.

many falutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis; (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too fanguinary a nature) the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wife institutions of king Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest feem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with fuch avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. duced the restraining statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and cloathing of millions; by affording them the means (with proper industry) to feed and to cloath themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved. How.

However, confidering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. though in general she was a wife and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet, the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predeceffors. It is true, she very feldom exerted this prerogative, fo as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to shew, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, furely, the true liberty of the subject confifts not fo much in the gracious behaviour, as in the limitted power, of the fovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet fure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced it's power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their perfonal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feodal lord, being usually some powerful baron, some opulent abbey,

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or fometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

Bur when learning, by the invention of printing and the progrefs of religious reformation, began to be univerfally diffeminated; when trade and navigation were fuddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights An inundation of wealth flowed in upon the of mankind. merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, flood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves) and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expences: to gratify which they were permitted, by the policy of the times, to diffipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine it's extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greatest despotism, that have been known in this island since the death of William the Norman: the prerogative, as it then stood by common law, (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as ther father king Henry the eighth. But the critical fituation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealoufy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advifers, had penetration enough to difcern how the power of the kingdom had gradually shifted it's channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown afide, but only to answer some important purpose: and, though the royal treafury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with fo much oeconomy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

On the accession of king James I, no new degree of royal power was added to, or exercifed by, him; but fuch a fceptre was too weighty to be wielded by fuch a hand. fonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, foon awakened the fleeping lion. The people heard with aftonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason asfured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could fanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to refift it: and accordingly refifted and opposed it, whenever the pufillanimous temper of the reigning monarch had courage to put it to the trial; and they gained fome little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of fanctuaries, and the extension of the bankrupt laws, the limitation of fuits and actions, and the regulating of informations upon penal statutes. not class the laws against witchcraft and conjuration under the head of improvements; nor did the difpute between lord Ellesmere and sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

INDEED when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for resusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that

misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darknefs. It must be acknowleded that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commisfion courts was also extremely great; though their usurped authority was still greater. And, if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclefiaftical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may fee grounds most amply sufficient for seeking redress in a legal conflitutional way. This redrefs, when fought, was also conflitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for afcertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants in capite in consequence of their feodal tenures: though it must be acknowleged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mifmanagement, or by the arts of his enemies, the king had loft the reputation of fincerity; which is the greatest unhappiness that can befal a prince-Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now confented to reduce it to a lower ebb than was confiftent with monarchical government. A conduct fo opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with refentment for past-oppressions,

and dreading the confequences if the king should regain his power, the popular leaders (who in all ages have called themfelves the people) began to grow infolent and ungovernable: their infolence soon rendered them desperate: and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of consusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of seodal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, viz. after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and confequences of military tenures, were taken away and abolished, except in the inftance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our antient conftitution, deferves no commendation from posterity, yet in his reign, (wicked, fanguinary, and turbulent as it was) the concurrence of happy circumstances was fuch, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, fince it's total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the habeas corpus act. These two statutes, with regard to our property and persons, form a second magna carta, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feodal fyftem; but the statute of Charles the second extirpated all it's flaveries;

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flaveries; except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interpolition of our courts of justice. Magna Carta only, in general terms, declared, that no man shall be imprisoned contrary to law: the habeas corpus act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ de haeretico comburendo; the statute of frauds and perjuries, a great and necessary fecurity to private property; the statute for distribution of intestages' estates; and that of amendments and jeofails, which cut off those superfluous niceties which fo long had difgraced our courts; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewife confider the freedom from taxes and armies which the fubject then enjoyed, will be fufficient to demonstrate this truth, " that the con-" stitution of England had arrived to it's full vigour, and " the true balance between liberty and prerogative was hap-" pily established by law, in the reign of king Charles the " fecond."

IT is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What feems incontestable is this, that by the law, as it then flood, (notwithstanding some invidious, nay. dangerous, branches of the prerogative have fince been lopped

m The point of time at which I and that for licenfing the press had exwould chuse to fix this theoretical perfec- pired: though the years which immetion of our public law, is the year 1679; diately followed it were times of great after the babeas corpus act was passed, practical oppression.

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off, and the rest more clearly defined) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to affert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprize and his throne together. Which introduces us to the last period of our legal history; viz.

VI. From the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration act, the act of fettlement with it's conditions, the act for uniting England with Scotland, and fome others: which have afferted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of refistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his difpenfing power to be illegal; have indulged tender consciences with every religious liberty, confistent with the safety of the state; have established triennial, fince turned into septennial, elections of members to ferve in parliament; have excluded certain officers from the house of commons: have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow-peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the defire of his present majesty) fet bounds to the civil lift, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like defire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally,

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nally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary) the vast acquisition of sorce, arising from the riot-act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly gained almost as much in influence, as it has apparently lost in prerogative.

THE chief alterations of moment (for the time would fail me to descend to minutiae ) in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of embaffadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had fprung out of the practical part of it: the protection of corporate rights by the improvements in writs of mandamus, and informations in nature of quo warranto: the regulations of trials by jury, and the admitting witnesses for prisoners upon oath: the farther restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of peine fort et dure: the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast increase of capital punishment: the new and effectual methods for the speedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and establishment of paper credit, by indorfements upon bills and notes, which have shewn the legal possibility and convenience (which our anceftors fo long doubted) of affigning a chose in action: the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and (which is much the better plan) the reformation of county courts: the great system of marine jurisprudence,

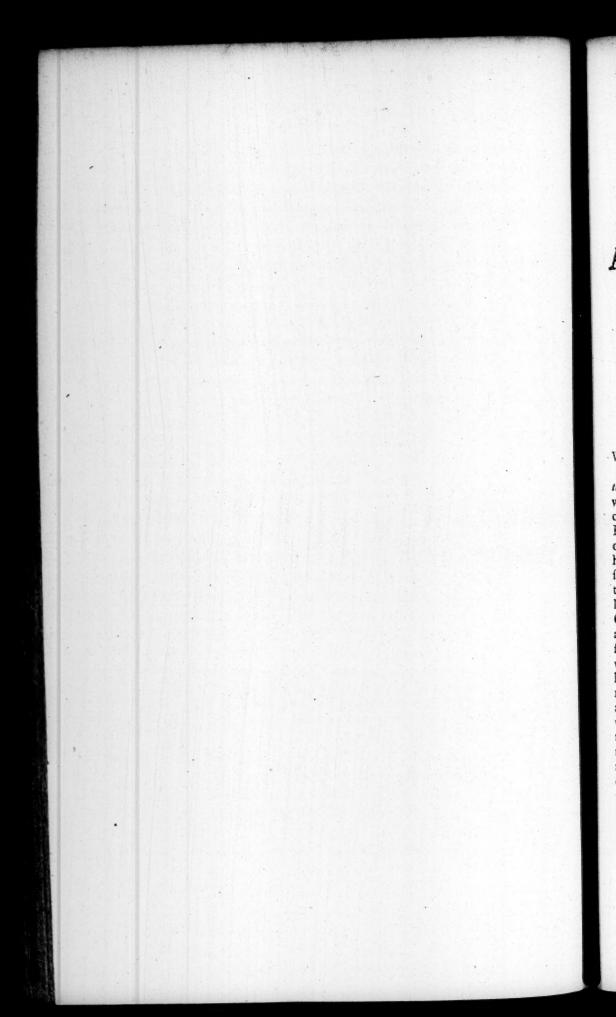
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of which the foundations have been laid, by clearly developing the principles on which policies of infurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced them to adopt (where facts can be clearly afcertained) the fame principles of redrefs as have prevailed in our courts of equity, from the time that lord Nottingham prefided there; and this, not only where specially impowered by particular statutes, (as in the case of bonds, mortgages, and fet-offs) but by extending the remedial influence of the equitable writ of trespass on the case, according to it's primitive institution by king Edward the first, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice, in the course of the present century.

THUS therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rife, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and rifen to the perfection they now enjoy, at different periods of time. We have feen, in the course of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wifdom of ages: that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, fince: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully

and explicitly acknowleged and defined, till the aera of the happy revolution. Of a conflitution fo wifely contrived, fo ftrongly raifed, and fo highly finished, it is hard to speak with that praise, which is justly and severely it's due :- the thorough and attentive contemplation of it will furnish it's best panegyric. It hath been the endeavour of these commentaries, however the execution may have fucceeded, to examine it's folid foundations, to mark out it's extensive plan, to explain the use and distribution of it's parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of antient fimplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, left we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To suftain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and fuch gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY of BRITAIN is a duty which they owe to themselves, who enjoy it; to their anceftors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

THE END



## APPENDIX.

§. 1. RECORD of an Indictment and Conviction of MURDER, at the Affices.

13 & it remembered, that at the general Seffion of Warwickshire, fession of the lord the king of over and over and terto wit, terminer holden at Warwick in and for the faid county of War-miner. wick, on Friday the twelfth day of March in the second year of the reign of the lord George the third, now king of Great Britain, before fir Michael Foster, knight, one of the justices of the faid lord the king assigned to hold pleas before the king himself, fir Edward Clive, knight, one of the justices of the faid lord the king, of his court of common bench, and others their fellows, justices of the faid lord the king, assigned by letters patent of the faid lord the king, under his great feal of Commission Great Britain, made to them the aforesaid justices and others, of and any two or more of them, (whereof one of them the faid fir Michael Foster and fir Edward Clive, the said lord the king would have to be one) to inquire (by the oath of good and lawful men of the county aforefaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprissions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies of Great Britain, and of other kingdoms or dominions whatfoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful affemblies, misprissions, confederacies, fasse allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, Ff3

deceits, and all other misdeeds, offences, and injuries whatso.

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aforesaid, as well within liberties as without, by whomsoever and howfoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the faid lord the king specified; the premises and every or any of them howfoever concerning; and for this time to hear and determine the faid treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses, and other misse-

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miner,

Grand jury. mesnors committed within the county aforesaid, by the oath of fir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, efquires, good and lawful men of the county aforesaid, then and there impanelled, swom, and charged to inquire for the faid lord the king and for the Indictment body of the faid county, it is presented, that Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and feduced by the instigation of the devil, on the fifth day of March in the faid fecond year of the reign of the faid lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the faid lord the king then and there being, feloniously, wilfully, and of his malice aforethought, did make an affault; and that the faid Peter Hunt with a certain drawn fword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left fide of the belly of him the faid Samuel Collins then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the faid Samuel Collins, then and there, with the fword drawn as aforefaid, in and upon the left fide of the belly of him the faid Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which faid mortal wound he the faid Samuel Collins, at the parish of Lighthorne aforefaid in the faid county of Warwick, from the faid fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which faid feventh day of March in the year aforesaid, the faid Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the faid Peter Hunt him the faid Samuel Collins, in manner and form aforefaid, feloniously, wilfully, and of his malice aforethought,

thought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. Whereupon the sheriff Capias. of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the faid Peter Hunt, if he may be found in his bailiwick, and him fafely keep, to answer to the felony and murder whereof he stands indicted. Which said Session of indictment the faid justices of the lord the king abovenamed, gaol-deliafterwards, to wit, at the delivery of the gaol of the faid lord the very. king, holden at Warwick in and for the county aforefaid, on Friday the fixth day of August in the said second year of the reign of the faid lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, fir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the faid lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined. 3nd after= Arraignmards, to wit, at the same delivery of the gaol of the said lord ment. the king of his county aforesaid, on the said Friday the fixth day of August, in the said second year of the reign of the said lord the king, before the faid justices of the lord the king last abovenamed and others their fellows aforefaid, here cometh the faid Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed) being brought to the bar here in his proper person by the faid sheriff, to whom he is here also committed: 31nd forthwith being demanded concerning the premises in the faid indictment above specified and charged upon him, how he will acquit himself thereof, he saith, that he is not guilty thereof; Plea; not and thereof for good and evil he puts himself upon the country: guilty. 3nd John Blencowe, esquire, clerk of the assises for the county Issue. aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: Therefore let a jury thereupon here immediately come before the faid justices of the lord the king last Venire. abovementioned, and others their fellows aforefaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne in the county of Warwick aforefaid, by whom the truth of the matter may be the better known, and who are not of kin to the faid Peter Hunt, to recognize upon their oath, whether the faid Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the faid John Blencowe, who profecutes for the faid lord the king in this behalf, as the faid Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the faid sheriff for this purpose impannelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Ff4

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Verdict; guilty of murder.

Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and fworn, to speak the truth of and concerning the premises, upon their oath fay, that the faid Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforefaid, as by the indictment aforefaid is above supposed against him; and that the faid Peter Hunt at the time of committing the faid felony and murder, or at any time fince to this time, had not nor hath any goods or chattels, lands or tenements, in the faid county of Warwick, or elfewhere, to the knowlege of the And upon this it is forthwith demanded of the faid faid jurors. Peter Hunt, if he hath or knoweth any thing to fay, wherefore the faid justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing farther faith, unless as he before had faid. Where: upon, all and fingular the premises being seen, and by the said juilices here fully understood, it is considered by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the faid county of Warwick from whence he came, and from thence to the place of execution on Monday now next enfuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be diffected and anatomized.

Judgment of death,

and diffection,

## §. 2. Conviction of Manslaughter.

Verdict ;murder; guilty of manslaugh-

- upon their oath fay, that the faid Peter Hunt is not not guilty of guilty of the murder aforesaid, above charged upon him; but that the faid Peter Hunt is guilty of the felonious flaying of the aforefaid Samuel Collins; and that he had not nor hath any goods of chattels, lands or tenements, at the time of the felony and manflaughter aforesaid, or ever afterwards to this time, to the knowlege of the faid jurors. And immediately it is demanded of the faid Peter Hunt, if he hath or knoweth any thing to fay, wherefore the faid justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who faith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. Whereupon, all and fingular Judgmentto the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the faid Peter Hunt be burned in his left hand, and delivered. diately he is burned in his left hand, and is delivered, according to the form of the statute.

Clergy be hurned in the hand, and delivered.

6. 3. Entry of a Trial instanter in the Court of King's Bench, upon a collateral Issue; and Rule of Court for Execution thereon.

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Michaelmas term, in the fixth year of the reign of king George the third.

The prisoner at the bar being brought Kent: The King against into this court in custody of the Thomas Rogers. I sheriff of the county of Suffex, by virtue of his majesty's writ of habeas corpus, it is ordered Habeas corthat the said writ and the return thereto be filed. And it ap-pus.

pearing by a certain record of attainder, which hath been Record of
attainder removed into this court by his majesty's writ of certiorari, that read; the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the for felony faid prisoner at the bar having heard the record of the faid and robbery. attainder now read to him, is now asked by the court here, what Prisoner he hath to fay for himself, why the Court here should not pro- asked what ceed to award execution against him upon the said attainder. he can say in bar of execution. bar of execution. faid record of attainder, named, and against whom judgment Plea; not was pronounced: and this he is ready to verify and prove, &c. the same To which said plea the honourable Charles Yorke, esquire, person. attorney-general of our present sovereign lord the king, who Replication. for our faid lord the king in this behalf profecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our faid lord the king by way of reply faith, that the faid prisoner now here at the bar is the fame Thomas Rogers in the faid record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; and the faid Isiue joined. prisoner at the bar doth the like: Therefore let a jury in this Venire abehalf immediately come here into court, by whom the truth of warded inthe matter will be the better known, and who have no affinity stanter. to the faid prisoner, to try upon their oath, whether the faid prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforefaid, or not: because as well the faid Charles Yorke, esquire, attorney-general of our said lord the king, who for our faid lord the king in this behalf profecutes, as the faid prisoner at the bar, have put themselves in this behalf upon the faid jury. 3110 immediately thereupon the faid jury come Jury sworn. here into court; and being elected, tried, and fworn to speak the truth touching and concerning the premises aforesaid, and having heard the faid record read to them, do fay upon their

Verdict; that he is the same.

Award of execution.

oath, that the faid prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the faid attorney-general hath by his faid replication to the faid plea of the faid prisoner now here at the bar alleged. 3nd hereupon the faid attorney-general on behalf of our faid lord the king now prayeth, that the court here would proceed to award execution against him the faid Thomas Rogers upon the faid attainder. Whereupon, all and fingular the premises being now feen and fully understood by the court here, it is ordered by the court here, that execution be done upon the faid prisoner at the bar for the faid felony in pursuance of the faid judgment, according to due form of law: 3nd it is laftly ordered, that he the faid Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the faid defendant the prisoner at the bar for the faid felony, in pursuance of the faid judgment, according to due form of law.

On the motion of Mr. Attorney General.

By the Court.

§. 4. Warrant of Execution on Judgment of Death, at the general Gaol delivery in London and Middlesex.

London and To the sheriffs of the city of London; and to the sheriff of the county of Middlesex; and to the keeper of his majesty's gaol of Newgate.

Cithereas at the fession of gaol delivery of Newgate, for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offences in their several indictments mentioned; Moin it is hereby ordered, that execution of the said sentence be made and done upon them the said Patrick Mahony and Roger Jones, on Wednesday the ninth day of this instant month of November at the usual place of execution. Ind it is his majesty's command, that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his majesty's pleasure touching them be farther known.

of November, one thousand seven hundred and sixty-eight.

James Eyre, Recorder. L. S.

§. 5. Writ of Execution upon a Judgment of Murder, lefore the King in Parliament.

GEDBGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriffs of London and sheriff of Middlefex, greeting. Whereas Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which faid indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon fuch arraignment hath pleaded not guilty; and the faid Lawrence earl Ferrers, viscount Tamworth, hath before us in our faid parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our faid parliament, that the faid Lawrence earl Ferrers, vifcount Tamworth, shall be hanged by the neck till he is dead, and that his body be diffected and anatomized, the execution of which judgment yet remaineth to be done: The require, and by these presents strictly command you, that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the fame day, him the faid Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your custody you then and there receive: and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the faid Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. Witness ourself at Westminster the second day of May, in the thirtythird year of our reign.

Yorke and Yorke.

THE END.

K A HAI

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# I N D E X.

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